

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**ORIGINAL**

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.	)	
	)	NO. C 07-01658 PJH
PLAINTIFFS,	)	
	)	JURY TRIAL
VS.	)	VOLUME 2
	)	
SAP AG, ET AL.,	)	PAGES 297 - 479
	)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
	)	TUESDAY, NOVEMBER 2, 2010

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**TRANSCRIPT OF PROCEEDINGS**

APPEARANCES:

FOR PLAINTIFFS:	BINGHAM MUCCUTCHEN LLP THREE EMBARCADERO CENTER SAN FRANCISCO, CALIFORNIA 94111-4607
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(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

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**A P P E A R A N C E S (CONT'D.)**

FOR DEFENDANTS: JONES DAY  
SILICON VALLEY OFFICE  
1755 EMBARCADERO ROAD  
PALO ALTO, CALIFORNIA 94303  
BY: THARAN GREGORY LANIER,  
JACQUELINE LEE, ATTORNEYS AT LAW

JONES DAY  
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SAN FRANCISCO, CALIFORNIA 94104  
BY: ROBERT A. MITTELSTAEDT,  
JASON MCDONELL, ATTORNEYS AT LAW

JONES DAY  
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HOUSTON, TEXAS 77002-2712  
BY: SCOTT W. COWAN, ATTORNEY AT LAW

ALSO PRESENT: CHRISTOPHER H. GILLESPIE  
MICHAEL A. PHARO  
ALAN RUFFIER  
DAVID SCHLAIFER

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2 THE UNSEALED TRANSCRIPT RESUMES ON PAGE 313.)

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4 \* \* \* \* \*

5 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE  
6 OF THE JURY IN OPEN COURT:)

7 **THE COURT:** ALL RIGHT. BE SEATED.

8 ALL RIGHT. GOOD MORNING, LADIES AND GENTLEMEN OF THE  
9 JURY.

10 PLEASE BE SEATED.

11 (OFF-THE-RECORD DISCUSSION.)

12 **THE COURT:** ALL RIGHT. WE'RE READY TO BEGIN OUR  
13 FIRST DAY OF TRIAL THIS MORNING. AND NOW THAT YOU ARE THE JURY  
14 IN THE CASE, IT IS MY DUTY TO INSTRUCT YOU ON THE LAW.

15 THERE ARE PRELIMINARY INSTRUCTIONS THAT I AM ABOUT TO  
16 GIVE YOU THAT YOU WILL NEED IN ORDER TO BE ABLE TO APPRECIATE  
17 THE EVIDENCE THAT YOU'RE GOING TO BE RECEIVING OVER THE NEXT  
18 COUPLE OF DAYS.

19 NOW YOU MUST NOT INFER FROM THE INSTRUCTIONS OR FROM  
20 ANYTHING THAT I MIGHT SAY OR DURING THE COURSE OF THE TRIAL AS  
21 INDICATING THAT I HAVE AN OPINION REGARDING THE EVIDENCE OR WHAT  
22 YOUR VERDICT SHOULD BE.

23 IT IS YOUR DUTY TO FIND THE FACTS FROM ALL OF THE  
24 EVIDENCE IN THE CASE, AND TO THOSE FACTS, YOU WILL APPLY THE LAW  
25 AS I GIVE IT TO YOU. YOU MUST FOLLOW THE LAW AS I GIVE IT TO

1 YOU, WHETHER YOU AGREE WITH IT OR NOT. AND YOU MUST NOT BE  
2 INFLUENCED BY PERSONAL LIKES, OR DISLIKES, OPINIONS, PREJUDICES,  
3 OR SYMPATHY. THAT MEANS THAT YOU MUST DECIDE THE CASE SOLELY ON  
4 THE EVIDENCE BEFORE YOU. YOU WILL RECALL THAT YESTERDAY, YOU  
5 TOOK AN OATH TO DO EXACTLY THAT.

6 AND IN FOLLOWING MY INSTRUCTIONS, YOU MUST FOLLOW ALL  
7 OF THEM AND NOT SINGLE OUT SOME AND IGNORE OTHERS. THEY ARE ALL  
8 EQUALLY IMPORTANT.

9 NOW, TO HELP YOU FOLLOW THE EVIDENCE, I WILL GIVE YOU  
10 A BRIEF SUMMARY OF WHO THE PARTIES ARE AND WHAT THEIR POSITIONS  
11 ARE.

12 AS I EXPLAINED YESTERDAY, THERE ARE THREE PLAINTIFFS,  
13 ORACLE U.S.A., INCORPORATED, WHICH I REFER TO AS "ORACLE  
14 U.S.A."; ORACLE INTERNATIONAL CORPORATION, WHICH WE WILL REFER  
15 TO AS "ORACLE INTERNATIONAL"; AND SIEBEL SYSTEMS, INCORPORATED,  
16 WHICH WE WILL REFER TO AS "SIEBEL SYSTEMS."

17 TOGETHER, THESE THREE ENTITIES COLLECTIVELY WILL BE  
18 REFERRED TO AS EITHER "ORACLE" OR "THE PLAINTIFFS." THERE ARE  
19 THREE DEFENDANTS IN THIS CASE. SAP AG, WHICH WILL BE REFERRED  
20 TO BY THAT NAME; SAP AMERICA, INCORPORATED, WHICH I WILL REFER  
21 TO AS "SAP AMERICA"; AND TOMORROWNOW, INCORPORATED, WHICH I WILL  
22 REFER TO AS SIMPLY "TOMORROWNOW."

23 COLLECTIVELY, THESE DEFENDANTS WILL BE REFERRED TO AS  
24 EITHER DEFENDANTS OR "SAP" -- WILL COLLECTIVELY BE REFERRED TO  
25 SIMPLY AS "DEFENDANTS."

1           SAP AMERICA IS A WHOLLY OWNED SUBSIDIARY OF SAP AG.  
2           AND TOMORROWNOW IS A WHOLLY OWNED SUBSIDIARY OF SAP AMERICA.

3           ORACLE ORIGINALLY ASSERTED TEN CLAIMS AGAINST THE  
4           DEFENDANTS. AS YOU WILL SEE FROM THE STIPULATIONS WHICH ARE  
5           INCLUDED IN YOUR JURY NOTEBOOKS, TOMORROWNOW HAS AGREED TO  
6           LIABILITY FOR ALL TEN CLAIMS.

7           FURTHER, AS TO THE FIRST CLAIM FOR COPYRIGHT  
8           INFRINGEMENT, AS YOU WILL SEE FROM THE STIPULATIONS INCLUDED IN  
9           YOUR JURY NOTEBOOK, SAP AG AND SAP AMERICA HAVE AGREED TO  
10          LIABILITY FOR VICARIOUS AND CONTRIBUTORY COPYRIGHT INFRINGEMENT.

11          HERE, THE ONLY ISSUE REMAINING FOR YOU TO DECIDE IS  
12          DAMAGES. SPECIFICALLY, YOU MUST DECIDE THE AMOUNT OF DAMAGES  
13          THAT SHOULD BE AWARDED TO ORACLE FOR DEFENDANTS' STIPULATED  
14          INFRINGEMENT OF ORACLE'S COPYRIGHTS, AS I WILL EXPLAIN TO YOU  
15          LATER IN THE CASE.

16          NOW, WHEN A PARTY HAS THE BURDEN OF PROOF ON ANY  
17          CLAIM BY A PREPONDERANCE OF THE EVIDENCE, IT MEANS THAT YOU MUST  
18          BE PERSUADED BY THE EVIDENCE THAT THE CLAIM IS MORE PROBABLY  
19          TRUE THAN NOT TRUE. AND YOU SHOULD BASE YOUR DECISION ON ALL OF  
20          THE EVIDENCE REGARDLESS OF WHICH PARTY PRESENTED IT.

21          NOW, YOU MAY CONSIDER THE -- THE ABILITY OF EACH  
22          PARTY TO PROVIDE EVIDENCE. IF A PARTY PROVIDED WEAKER EVIDENCE  
23          WHEN IT COULD HAVE PROVIDED STRONGER EVIDENCE, YOU MAY DISTRUST  
24          THE WEAKER EVIDENCE.

25          YOU SHOULD DECIDE THE CASE SEPARATELY FOR EACH

1 PLAINTIFF AND AS TO EACH DEFENDANT SEPARATELY.

2 UNLESS OTHERWISE STATED, THE INSTRUCTIONS APPLY TO  
3 ALL OF THE PARTIES.

4 NOW, THE EVIDENCE YOU ARE TO CONSIDER IN DECIDING  
5 WHAT THE FACTS CONSIST OF, ONE, THE SWORN TESTIMONY OF ANY  
6 WITNESS; TWO, THE EXHIBITS WHICH ARE RECEIVED HERE IN COURT INTO  
7 EVIDENCE; AND, THREE, ANY FACTS TO WHICH THE LAWYERS HAVE  
8 AGREED. WE REFER TO THOSE AGREEMENTS AS STIPULATIONS.

9 AND IN REACHING YOUR VERDICT, YOU MAY CONSIDER ONLY  
10 THE TESTIMONY AND EXHIBITS OF THE -- THE EXHIBITS THAT HAVE BEEN  
11 RECEIVED IN EVIDENCE.

12 THERE ARE OTHER THINGS, HOWEVER, THAT ARE NOT  
13 EVIDENCE, AND YOU MAY NOT CONSIDER THEM IN DECIDING WHAT THE  
14 FACTS ARE. I WILL LIST THEM FOR YOU. ONE, THE ARGUMENTS AND  
15 THE STATEMENTS BY THE LAWYERS ARE NOT EVIDENCE. THE LAWYERS ARE  
16 NOT WITNESSES. WHAT THEY SAY, WHAT THEY WILL SAY IN THEIR  
17 CLOSING ARGUMENTS, IN THEIR OPENING STATEMENTS, AND AT OTHER  
18 TIMES THROUGHOUT THE COURSE OF THE TRIAL IS INTENDED TO HELP YOU  
19 INTERPRET THE EVIDENCE, BUT IT IS NOT ITSELF EVIDENCE.

20 IF THE FACTS AS YOU REMEMBER THEM DIFFER FROM THE WAY  
21 THAT THE LAWYERS HAVE STATED THEM, YOUR MEMORY OF THOSE FACTS  
22 CONTROL.

23 NOW, NO. 2, THE QUESTIONS AND THE OBJECTIONS BY THE  
24 LAWYERS ARE NOT EVIDENCE. ATTORNEYS HAVE A DUTY TO THEIR  
25 RESPECTIVE CLIENTS TO OBJECT WHEN THEY BELIEVE A QUESTION IS

1 IMPROPER UNDER THE RULES OF EVIDENCE. YOU SHOULD NOT BE  
2 INFLUENCED BY THE OBJECTION OR BY THE COURT'S RULING ON IT.

3 NO. 3, TESTIMONY THAT HAS BEEN EXCLUDED OR STRICKEN  
4 OR THAT YOU HAVE BEEN INSTRUCTED TO DISREGARD IS NOT EVIDENCE  
5 AND MUST NOT BE CONSIDERED. IN ADDITION, SOMETIMES TESTIMONY  
6 AND EXHIBITS ARE RECEIVED ONLY FOR A LIMITED PURPOSE. AND WHEN  
7 I GIVE A LIMITING INSTRUCTION, YOU MUST FOLLOW IT.

8 AND LASTLY, NO. 4, ANYTHING YOU MAY HAVE SEEN OR  
9 HEARD WHEN THE COURT IS NOT IN SESSION IS NOT EVIDENCE. YOU ARE  
10 TO DECIDE THE CASE SOLELY ON THE EVIDENCE RECEIVED HERE AT  
11 TRIAL.

12 NOW, AS I INDICATED, SOME EVIDENCE MAY BE ADMITTED  
13 ONLY FOR A LIMITED PURPOSE, AND WHEN I INSTRUCT YOU THAT AN ITEM  
14 OF EVIDENCE HAS BEEN ADMITTED FOR A LIMITED PURPOSE, THAT MEANS  
15 THAT YOU MUST CONSIDER IT ONLY FOR THE LIMITED PURPOSE AND FOR  
16 NO OTHER REASON.

17 NOW, EVIDENCE MAY BE DIRECT OR CIRCUMSTANTIAL.  
18 DIRECT EVIDENCE IS DIRECT PROOF OF A FACT SUCH AS TESTIMONY BY A  
19 WITNESS ABOUT WHAT THAT WITNESS PERSONALLY SAW OR HEARD OR DID.  
20 CIRCUMSTANTIAL EVIDENCE IS PROOF OF ONE OR MORE FACTS FROM WHICH  
21 YOU COULD FIND ANOTHER FACT. AND YOU SHOULD CONSIDER BOTH KINDS  
22 OF EVIDENCE.

23 THE LAW MAKES NO DISTINCTION BETWEEN WEIGHT TO BE  
24 GIVEN, EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE. IT IS FOR YOU  
25 TO DECIDE HOW MUCH WEIGHT TO GIVE ANY EVIDENCE.



1                   NOW, THERE ARE RULES OF EVIDENCE THAT CONTROL WHAT  
2 CAN BE RECEIVED INTO EVIDENCE. WHEN A LAWYER ASKS A QUESTION OR  
3 OFFERS AN EXHIBIT INTO EVIDENCE AND THE LAWYER ON THE OTHER SIDE  
4 THINKS THAT IT IS NOT PERMITTED BY THE RULES OF EVIDENCE, THAT  
5 LAWYER MAY OBJECT. IF I OVERRULE THE OBJECTION, THE QUESTION  
6 MAY BE ANSWERED OR THE EXHIBIT MAY BE RECEIVED. IF I SUSTAIN  
7 THE OBJECTION, THE QUESTION CANNOT BE ANSWERED AND THE EXHIBIT  
8 CANNOT BE RECEIVED. AND WHENEVER I SUSTAIN AN OBJECTION TO A  
9 QUESTION, YOU MUST IGNORE THE QUESTION AND MUST NOT GUESS AS TO  
10 WHAT THE ANSWER MIGHT HAVE BEEN.

11                   NOW, SOMETIMES I MAY ORDER THAT EVIDENCE BE STRICKEN  
12 FROM THE RECORD AND THAT YOU DISREGARD OR IGNORE THE EVIDENCE.  
13 THAT MEANS THAT WHEN YOU ARE DECIDING THE CASE, YOU MUST NOT  
14 CONSIDER THE EVIDENCE THAT I TOLD YOU TO DISREGARD.

15                   IN DECIDING THE FACTS OF THE CASE, YOU MAY HAVE TO  
16 DECIDE WHICH TESTIMONY TO BELIEVE AND WHICH TESTIMONY NOT TO  
17 BELIEVE. YOU MAY BELIEVE EVERYTHING THAT A WITNESS SAYS OR PART  
18 OF IT OR NONE OF IT. PROOF OF A FACT DOES NOT NECESSARILY  
19 DEPEND UPON THE NUMBER OF WITNESSES WHO TESTIFY ABOUT IT. AND  
20 IN CONSIDERING THE TESTIMONY OF ANY WITNESS, YOU MAY TAKE INTO  
21 ACCOUNT THE FOLLOWING THINGS: ONE, THE OPPORTUNITY AND THE  
22 ABILITY OF THE WITNESS TO HEAR OR KNOW OR -- TO SEE OR HEAR OR  
23 KNOW THE THINGS ABOUT WHICH THE WITNESS IS TESTIFYING TO; TWO,  
24 THE WITNESS'S MEMORY; THREE, THE WITNESS'S MANNER WHILE  
25 TESTIFYING; FOUR, THE WITNESS'S INTEREST IN THE OUTCOME OF THE

1 CASE AND ANY BIAS OR PREJUDICE; FIVE, WHETHER OTHER EVIDENCE  
2 CONTRADICTED THE WITNESS'S TESTIMONY; SIX, THE REASONABLENESS OF  
3 THE WITNESS'S TESTIMONY IN LIGHT OF ALL OF THE EVIDENCE; AND  
4 SEVEN, ANY OTHER FACTORS THAT BEAR ON BELIEVABILITY.

5 THE WEIGHT OF THE EVIDENCE AS TO A FACT DOES NOT  
6 NECESSARILY DEPEND UPON THE NUMBER OF WITNESSES WHO TESTIFY  
7 ABOUT IT.

8 NOW, A WITNESS WHO IS WILLFULLY FALSE IN ONE MATERIAL  
9 PART OF HIS OR HER TESTIMONY IS TO BE DISTRUSTED IN OTHERS. YOU  
10 MAY REJECT THE WHOLE TESTIMONY OF A WITNESS WHO WILLFULLY HAS  
11 TESTIFIED FALSELY AS TO A MATERIAL POINT UNLESS FROM ALL THE  
12 EVIDENCE YOU BELIEVE THE PROBABILITY OF TRUTH FAVORS HIS OR HER  
13 TESTIMONY IN OTHER PARTICULARS.

14 AND YOU ARE TO CONSIDER ONLY THE EVIDENCE IN THE  
15 CASE. HOWEVER, YOU ARE NOT LIMITED TO THE STATEMENTS OF THE  
16 WITNESSES. IN OTHER WORDS, YOU'RE NOT LIMITED TO WHAT YOU SEE  
17 AND HEAR -- WHAT YOU SEE AND HEAR AS THE WITNESSES TESTIFY. YOU  
18 MAY DRAW FROM THE FACTS THAT YOU FIND HAVE BEEN PROVED SUCH  
19 REASONABLE INFERENCES AS SEEM JUSTIFIED IN LIGHT OF YOUR  
20 EXPERIENCE.

21 INFERENCES ARE DEDUCTIONS OR CONCLUSIONS WHICH REASON  
22 AND COMMON SENSE LEAD YOU TO DRAW FROM FACTS ESTABLISHED BY THE  
23 EVIDENCE IN THE CASE.

24 NOW, DURING DELIBERATIONS, YOU WILL HAVE TO MAKE YOUR  
25 DECISION BASED UPON WHAT YOU RECALL OF THE CASE. YOU WILL NOT

1 HAVE A TRANSCRIPT OF THE TRIAL. AND I URGE YOU TO PAY CLOSE  
2 ATTENTION TO THE TESTIMONY AS IT IS GIVEN.

3 IF AT ANY TIME, YOU CANNOT HEAR OR SEE TESTIMONY, ANY  
4 EVIDENCE, EXHIBITS, ANY QUESTIONS OR ARGUMENTS, PLEASE LET ME  
5 KNOW THAT SO WE CAN CORRECT THE PROBLEM. JUST RAISE YOUR HAND,  
6 I'LL ASK YOU TO EXPLAIN WHAT DIFFICULTY YOU'RE HAVING.

7 NOW, IF YOU WISH, YOU MAY TAKE NOTES TO HELP YOU  
8 REMEMBER THE EVIDENCE. IF YOU DO TAKE NOTES, PLEASE KEEP THEM  
9 TO YOURSELF UNTIL YOU AND YOUR FELLOW JURORS GO INTO JURY ROOM  
10 TO DECIDE THE CASE. AND DO NOT LET NOTE-TAKING DISTRACT YOU.

11 WHEN YOU LEAVE IN THE EVENING, YOUR NOTES SHOULD BE  
12 LEFT IN THE JURY ROOM, AND NO ONE WILL READ YOUR NOTES, AND THEY  
13 WILL BE DESTROYED AT THE CONCLUSION OF THE CASE. BUT WHETHER OR  
14 NOT YOU TAKE NOTES, YOU SHOULD RELY ON YOUR OWN MEMORY OF THE  
15 EVIDENCE. NOTES ARE ONLY TO ASSIST YOUR MEMORY, AND YOU SHOULD  
16 NOT BE OVERLY INFLUENCED BY YOUR NOTES OR THOSE OF YOUR FELLOW  
17 JURORS.

18 YOU MAY NOT MAKE A -- MAKE ANY ASSUMPTIONS ABOUT A  
19 WITNESS OR A PARTY BASED SOLELY UPON THE USE OF AN INTERPRETER  
20 TO ASSIST THE WITNESS OR PARTY. SOME OF THE WITNESSES WHO WILL  
21 TESTIFY LIVE IN THE COURTROOM OR VIA DEPOSITION VIDEO CLIP DO  
22 NOT SPEAK ENGLISH AS A NATIVE LANGUAGE. SOME OF THE WITNESSES  
23 SPEAK GERMAN AS A NATIVE LANGUAGE. YOU MUST NOT MAKE ANY  
24 ASSUMPTIONS ABOUT A WITNESS OR A PARTY BASED UPON THE LANGUAGE  
25 THAT IS USED BY ANY WITNESS IN COMMUNICATING WITH HIS OR HER

1 COLLEAGUES OR OTHERS.

2 THE EVIDENCE TO BE CONSIDERED BY YOU IS ONLY THAT  
3 PROVIDED THROUGH THE OFFICIAL COURT TRANSLATORS, ALTHOUGH SOME  
4 OF YOU MAY KNOW GERMAN OR SOME OTHER FOREIGN LANGUAGE USED AND  
5 TRANSLATED DURING THE COURSE OF THE CASE, IT IS IMPORTANT THAT  
6 ALL JURORS CONSIDER THE SAME EVIDENCE. THEREFORE, YOU MUST  
7 ACCEPT THE ENGLISH LANGUAGE TRANSLATION, AND YOU MUST DISREGARD  
8 ANY DIFFERENT MEANING OR UNDERSTANDING YOU MIGHT HAVE OF THE  
9 WORDS USED.

10 ONE OF THE PARTIES, SPECIFICALLY DEFENDANT SAP AG, IS  
11 INCORPORATED IN ANOTHER COUNTRY. YOU MUST MAKE -- MUST NOT MAKE  
12 ANY ASSUMPTIONS ABOUT A PARTY BASED ON WHERE IT IS INCORPORATED  
13 OR WHERE IT IS HEADQUARTERED.

14 THE PARTIES HAVE AGREED TO CERTAIN FACTS AND THEIR  
15 WRITTEN STIPULATIONS OF FACT ARE PLACED IN EVIDENCE AS EXHIBITS  
16 1 THROUGH -- 1 THROUGH 3. THESE EXHIBITS CAN BE FOUND IN YOUR  
17 JUROR NOTEBOOKS AND MAY BE REFERRED TO BY THE PARTIES THROUGHOUT  
18 THE COURSE OF THE TRIAL. YOU SHOULD TREAT FACTS WITHIN THE  
19 STIPULATIONS AS HAVING ALREADY BEEN PROVED.

20 NOW, AS WE'VE SAID BEFORE, THE PARTIES HAVE ALREADY  
21 REACHED STIPULATIONS INCLUDING THAT TOMORROWNOW IS DIRECTLY  
22 LIABLE TO THE PLAINTIFFS FOR ALL THE CLAIMS THAT THE PLAINTIFFS  
23 HAVE ASSERTED AND THAT SAP AG AND SAP AMERICA ARE CONTRIBUTORILY  
24 AND VICARIOUSLY LIABLE FOR TOMORROWNOW'S COPYRIGHT INFRINGEMENT.

25 YOU SHOULD THEREFORE TREAT THESE CLAIMS AS HAVING

1 BEEN PROVED. THOSE STIPULATIONS OF LIABILITY WILL BE FOUND IN  
2 YOUR JURY -- JUROR NOTEBOOKS AT EXHIBITS 4 AND 5. AND THEY WILL  
3 BE REFERRED TO THROUGHOUT THE COURSE OF THE TRIAL BY THE  
4 PARTIES.

5 NOW, A DEPOSITION IS THE SWORN TESTIMONY OF A WITNESS  
6 THAT WAS TAKEN BEFORE TRIAL. THE WITNESS IS PLACED UNDER OATH  
7 TO TELL THE TRUTH, AND THE LAWYERS FOR EACH PARTY MAY ASK  
8 QUESTIONS. THE QUESTIONS AND ANSWERS ARE RECORDED. WHEN A  
9 PERSON IS UNAVAILABLE TO TESTIFY AT TRIAL, THE DEPOSITION OF  
10 THAT PERSON MAY BE USED AT TRIAL. YOU SHOULD CONSIDER  
11 DEPOSITION TESTIMONY PRESENTED TO YOU IN COURT IN LIEU OF LIVE  
12 TESTIMONY INSOFAR AS POSSIBLE IN THE SAME WAY AS IF THE WITNESS  
13 HAD BEEN PRESENT TO TESTIFY.

14 EVIDENCE MAY BE PRESENTED TO YOU IN THE FORM OF  
15 ANSWERS TO ONE OF THE PARTIES TO WRITTEN INTERROGATORIES  
16 SUBMITTED BY THE OTHER SIDE. THESE ANSWERS WERE GIVEN IN  
17 WRITING AND UNDER OATH BEFORE THE ACTUAL TRIAL AND IN RESPONSE  
18 TO QUESTIONS THAT WERE SUBMITTED IN WRITING UNDER ESTABLISHED  
19 COURT PROCEDURES.

20 YOU SHOULD CONSIDER THE ANSWERS INSOFAR AS POSSIBLE  
21 IN THE SAME WAY AS IF THEY WERE MADE FROM THE WITNESS STAND.

22 BEFORE TRIAL, EACH PARTY HAS THE RIGHT TO ASK ANOTHER  
23 PARTY TO ADMIT IN WRITING THAT CERTAIN MATTERS ARE TRUE. IF THE  
24 OTHER PARTY ADMITS THOSE MATTERS, YOU MUST ACCEPT THEM AS TRUE.  
25 NO FURTHER EVIDENCE IS REQUIRED TO PROVE THEM. AND YOU MUST

1 ALSO ACCEPT AS TRUE ANY STIPULATED FACTS THAT I READ TO YOU AND  
2 THOSE SET FORTH IN THE STIPULATIONS THAT I WILL PROVIDE YOU, AS  
3 WELL AS THOSE THAT HAVE ALREADY BEEN PROVIDED IN YOUR JUROR  
4 NOTEBOOK.

5 SOME WITNESSES, BECAUSE OF EDUCATION OR EXPERIENCE,  
6 ARE PERMITTED TO STATE OPINIONS AND THE REASONS FOR THOSE  
7 OPINIONS. OPINION TESTIMONY SHOULD BE JUDGED LIKE -- JUST LIKE  
8 ANY OTHER TESTIMONY. YOU MAY ACCEPT IT OR REJECT IT AND GIVE IT  
9 AS MUCH WEIGHT AS YOU THINK IT DESERVES, CONSIDERING THE  
10 WITNESS'S EDUCATION AND EXPERIENCE, THE REASONS GIVEN FOR THE  
11 OPINION AND ALL OTHER EVIDENCE IN THE CASE.

12 CHARTS AND SUMMARIES NOT ACTUALLY RECEIVED IN  
13 EVIDENCE MAY BE SHOWN TO YOU IN ORDER TO HELP EXPLAIN THE  
14 CONTENTS OF BOOKS, RECORDS, DOCUMENTS, AND OTHER EVIDENCE IN THE  
15 CASE. THEY ARE NOT THEMSELVES EVIDENCE OR PROOF OF ANY FACTS.  
16 IF THEY DO NOT CORRECTLY REFLECT THE FACTS OR FIGURES SHOWN BY  
17 THE EVIDENCE IN THE CASE, THEN YOU SHOULD DISREGARD THE CHARTS  
18 AND SUMMARIES AND DETERMINE THE FACTS FROM THE UNDERLYING  
19 EVIDENCE.

20 CERTAIN CHARTS AND SUMMARIES MAY ACTUALLY BE RECEIVED  
21 IN EVIDENCE TO ILLUSTRATE INFORMATION BROUGHT OUT IN TRIAL.  
22 CHARTS AND SUMMARIES ARE ONLY AS GOOD AS THE UNDERLYING EVIDENCE  
23 THAT SUPPORTS THEM. YOU SHOULD THEREFORE GIVE THEM ONLY SUCH  
24 WEIGHT AS YOU THINK THE UNDERLYING EVIDENCE DESERVES.

25 ALL PARTIES ARE EQUAL BEFORE THE LAW, AND A

1 CORPORATION IS ENTITLED TO THE SAME FAIR AND CONSCIENTIOUS  
2 CONSIDERATION BY YOU AS ANY OTHER PARTY. AND UNDER THE LAW, A  
3 CORPORATION IS CONSIDERED TO BE A PERSON. IT CAN ONLY ACT  
4 THROUGH ITS EMPLOYEES, AGENTS, DIRECTORS, OR OFFICERS; THEREFORE  
5 A CORPORATION IS RESPONSIBLE FOR THE ACTS OF ITS EMPLOYEES,  
6 AGENTS, DIRECTORS, AND OFFICERS PERFORMED WITHIN THE SCOPE OF  
7 AUTHORITY.

8 AN ACT IS WITHIN THE SCOPE OF A PERSON'S AUTHORITY IF  
9 IT IS WITHIN THE RANGE OF REASONABLE AND FORESEEABLE ACTIVITIES  
10 THAT EMPLOYEE, AGENT, DIRECTOR OR OFFICER ENGAGES IN WHILE  
11 CARRYING OUT THAT PERSON'S BUSINESS.

12 ALL RIGHT. DEFENDANTS DID NOT PRODUCE IN A TIMELY  
13 FASHION CERTAIN RELEVANT INSTANT MESSAGES, WHICH WE'LL REFER TO  
14 AS IM'S, INVOLVING TOMORROWNOW EMPLOYEES. AS A RESULT,  
15 PLAINTIFFS WERE UNABLE TO FULLY INVESTIGATE AND USE THE  
16 LATE-PRODUCED INSTANT MESSAGES DURING PREPARATION FOR THIS  
17 TRIAL. THEREFORE, IF ANY OF THESE INSTANT MESSAGES ARE  
18 INTRODUCED INTO EVIDENCE DURING TRIAL AND IF THERE IS ANY  
19 DISPUTE ABOUT THEIR MEANING, YOU SHOULD INTERPRET THEM  
20 CONSISTENTLY WITH WHAT YOU FIND TO BE ANY REASONABLE  
21 INTERPRETATION PRESENTED BY THE PLAINTIFFS IN THIS CASE.

22 NOW, I'LL SAY A FEW WORDS ABOUT YOUR CONDUCT AS  
23 JURORS. FIRST, KEEP AN OPEN MIND THROUGHOUT THE TRIAL AND DO  
24 NOT DECIDE WHAT THE VERDICT SHOULD BE UNTIL YOU AND YOUR FELLOW  
25 JURORS HAVE HAD -- HAVE COMPLETED YOUR DISCUSSIONS AND

1 DELIBERATIONS AT THE END OF THE CASE.

2 SECOND, BECAUSE YOU MUST DECIDE THE CASE BASED ONLY  
3 ON EVIDENCE RECEIVED -- RECEIVED IN THE CASE AND HERE IN THE  
4 COURTROOM AND ON MY INSTRUCTIONS AS TO THE LAW THAT APPLIES, YOU  
5 MUST NOT BE EXPOSED TO ANY OTHER INFORMATION ABOUT THE CASE OR  
6 TO THE ISSUES THAT IT INVOLVES DURING THE COURSE OF YOUR -- YOUR  
7 JURY DUTY. THUS, UNTIL THE END OF THE CASE OR UNTIL I TELL YOU  
8 OTHERWISE, DO NOT COMMUNICATE WITH ANYONE AND DO NOT LET ANYONE  
9 ELSE COMMUNICATE WITH YOU IN ANY WAY ABOUT THE MERITS OF THE  
10 CASE OR ANYTHING TO DO WITH THE CASE.

11 THIS INCLUDES DISCUSSING THE CASE IN PERSON, IN  
12 WRITING, BY PHONE, OR OTHER ELECTRONIC MEANS, VIA EMAIL, TEXT  
13 MESSAGING OR ANY INTERNET CHAT ROOM, BLOG, WEBSITE OR USING ANY  
14 OTHER ELECTRONIC TOOLS TO OBTAIN INFORMATION ABOUT THIS CASE OR  
15 TO HELP YOU DECIDE THE CASE.

16 AND PLEASE DO NOT TRY TO FIND OUT INFORMATION FROM  
17 ANY SOURCE OUTSIDE THE CONFINES OF THE COURTROOM.

18 UNTIL YOU RETIRE TO DELIBERATE, YOU MAY NOT DISCUSS  
19 THE CASE WITH ANYONE, EVEN YOUR FELLOW JURORS. AFTER YOU RETIRE  
20 TO DELIBERATE, YOU MAY BEGIN DISCUSSING THE CASE WITH YOUR  
21 FELLOW JURORS, BUT YOU CANNOT DISCUSS THE CASE WITH ANYONE ELSE  
22 UNTIL YOU HAVE RETURNED A VERDICT AND THE CASE IS AT AN END.

23 I HOPE THAT FOR ALL OF YOU THE CASE IS INTERESTING  
24 AND NOTEWORTHY. I KNOW THAT MANY OF YOU USE CELL PHONES AND  
25 BLACKBERRIES AND THE INTERNET AND OTHER TOOLS OF TECHNOLOGY.



1 YOU MUST ALSO NOT TALK TO ANYONE ABOUT THIS CASE OR USE THESE  
2 TOOLS TO COMMUNICATE ELECTRONICALLY WITH ANYONE ABOUT THIS CASE.  
3 AND THIS DOES INCLUDE YOUR FAMILY AND FRIENDS.

4 AND YOU MAY NOT COMMUNICATE WITH ANYONE ABOUT THE  
5 CASE ON YOUR CELL PHONE, THROUGH EMAIL, BLACKBERRIES, IPHONES,  
6 THROUGH TEXT MESSAGING OR ON TWITTER, THROUGH ANY BLOG OR  
7 WEBSITE, THROUGH ANY INTERNET CHAT ROOM OR BY WAY OF ANY OTHER  
8 SOCIAL NETWORKING WEBSITES, INCLUDING FACEBOOK, TWITTER,  
9 MYSPACE, LINKED-IN AND U-TUBE.

10 BUT IF YOU ARE ASKED OR APPROACHED IN ANY WAY ABOUT  
11 YOUR JURY SERVICE OR ANYTHING ABOUT THIS CASE, YOU MUST RESPOND  
12 THAT YOU HAVE BEEN ORDERED NOT TO DISCUSS THE MATTER, AND THEN  
13 YOU ARE TO REPORT THE CONTACT TO THE COURT.

14 BECAUSE YOU WILL RECEIVE ALL OF THE EVIDENCE AND  
15 LEGAL INSTRUCTION YOU PROPERLY MAY CONSIDER TO RETURN A VERDICT,  
16 DO NOT READ, WATCH, OR LISTEN TO ANY NEWS OR MEDIA ACCOUNTS OR  
17 COMMENTARY ABOUT THE CASE OR ANYTHING HAVING TO DO WITH THE  
18 CASE.

19 DO NOT DO ANY RESEARCH, SUCH AS CONSULTING  
20 DICTIONARIES OR SEARCHING THE INTERNET OR USING OTHER REFERENCE  
21 MATERIALS. AND DO NOT MAKE ANY INVESTIGATION OR IN ANY OTHER  
22 WAY TRY TO LEARN ABOUT THE CASE OR THE PARTIES ON YOUR OWN. THE  
23 LAW REQUIRES THESE RESTRICTIONS TO ENSURE THAT THE PARTIES HAVE  
24 A FAIR TRIAL BASED UPON THE SAME EVIDENCE THAT EACH PARTY HAS  
25 HAD AN OPPORTUNITY TO ADDRESS.

1 A JUROR WHO VIOLATES THESE RESTRICTIONS JEOPARDIZES  
2 THE FAIRNESS OF THE PROCEEDINGS, AND A MISTRIAL COULD RESULT  
3 THAT WOULD REQUIRE THE ENTIRE PROCESS TO START OVER AGAIN.

4 IF ANY JUROR IS EXPOSED TO ANY OUTSIDE INFORMATION,  
5 PLEASE NOTIFY THE COURT IMMEDIATELY.

6 NOW, FROM TIME TO TIME DURING THE TRIAL, IT MAY  
7 BECOME NECESSARY FOR ME TO TALK WITH THE ATTORNEYS OUTSIDE OF  
8 THE HEARING OF THE JURY, EITHER BY HAVING A CONFERENCE AT THE  
9 BENCH, WHICH WE CALL A SIDEBAR, OR WHEN THE JURY'S NOT IN --  
10 PRESENT OR BY CALLING A RECESS. WE WILL TRY TO KEEP THESE AT A  
11 MINIMUM. BUT UNDERSTAND WHILE YOU ARE WAITING, WE ARE WORKING.

12 AND THE PURPOSES OF THE CONFERENCES IS -- IT'S NOT TO  
13 KEEP INFORMATION FROM YOU, BUT IT'S TO DECIDE HOW CERTAIN  
14 EVIDENCE IS TO BE TREATED UNDER THE RULES OF EVIDENCE AND TO  
15 AVOID ANY CONFUSION OR ERROR. AS I SAID, WE WILL DO WHAT WE CAN  
16 TO KEEP THE NUMBER AND THE LENGTH OF THE CONFERENCES TO A  
17 MINIMUM.

18 I MAY NOT ALWAYS GRANT AN ATTORNEY'S REQUEST FOR A  
19 CONFERENCE. DO NOT CONSIDER MY GRANTING OR DENYING SUCH A  
20 REQUEST AS ANY INDICATION OF MY OPINION OF THE CASE OR WHAT YOUR  
21 VERDICT SHOULD BE.

22 NOW, THE TRIAL -- TRIALS PROCEED IN THE FOLLOWING  
23 WAY: FIRST, EACH SIDE MAY MAKE AN OPENING STATEMENT. AN  
24 OPENING STATEMENT IS NOT EVIDENCE. IT IS SIMPLY AN OUTLINE TO  
25 HELP YOU UNDERSTAND WHAT THAT PARTY EXPECTS THE EVIDENCE WILL

1 SHOW. A PARTY IS NOT REQUIRED TO MAKE AN OPENING STATEMENT.

2 THEN THE PLAINTIFF WILL PRESENT EVIDENCE, AND COUNSEL  
3 FOR THE DEFENDANT MAY CROSS-EXAMINE. THEN THE DEFENDANT MAY  
4 PRESENT EVIDENCE, AND COUNSEL FOR THE PLAINTIFF MAY  
5 CROSS-EXAMINE. AFTER THE EVIDENCE HAS BEEN PRESENTED, I WILL  
6 INSTRUCT YOU ON THE LAW THAT APPLIES TO THE CASE, AND THE  
7 ATTORNEYS WILL MAKE CLOSING ARGUMENTS.

8 AFTER THAT, YOU WILL GO TO THE JURY ROOM TO  
9 DELIBERATE ON YOUR VERDICT.

10 ALL RIGHT. WE ARE NOW READY TO BEGIN. OPENING  
11 STATEMENT WILL BE PRESENTED BY ORACLE. WHICH OF ORACLE'S  
12 COUNSEL --

13 **MR. HOWARD:** JEFF HOWARD FOR ORACLE.

14 **THE COURT:** ALL RIGHT. GOOD MORNING, MR. HOWARD.  
15 ARE YOU READY TO GO FORWARD?

16 **MR. HOWARD:** YES, YOUR HONOR.

17 **THE COURT:** ALL RIGHT.

18 **OPENING STATEMENT**

19 **MR. HOWARD:** GOOD MORNING, LADIES AND GENTLEMEN OF  
20 THE JURY.

21 LET ME START BY THANKING YOU FOR YOUR TIME AND YOUR  
22 SERVICE IN THE TRIAL. JURY SERVICE IS REALLY THE FOUNDATION OF  
23 OUR JUSTICE SYSTEM, AND OUR JUSTICE SYSTEM IS WHAT PROTECTS ALL  
24 OF OUR RIGHTS AND VALUES.

25 NOW, EVERY CASE IS IMPORTANT, PARTICULARLY TO THE

1 PARTIES WHO ARE INVOLVED IN IT. THIS IS NOT A CASE THAT  
2 INVOLVES PHYSICAL HARM OR LOSS OF LIFE OR SOMETHING OF THAT  
3 NATURE. BUT I THINK YOU'LL FIND AS WE GET TO THE END OF THE  
4 CASE THAT IT IS A CASE THAT INVOLVES SOME VERY IMPORTANT VALUES  
5 AND PRINCIPLES, SUCH AS FAIR COMPETITION AND BEING ACCOUNTABLE  
6 FOR YOUR ACTIONS, THAT ARE IMPORTANT FOR ALL BUSINESSES AND  
7 PEOPLE TO LIVE BY.

8 NOW, THIS IS ONE OF TWO TIMES AFTER YESTERDAY THAT  
9 OUR SIDE WILL HAVE A CHANCE TO GET UP AND SPEAK WITH YOU  
10 DIRECTLY. THE NEXT TIME WILL BE AT THE END OF ALL OF THE  
11 EVIDENCE, ABOUT A MONTH FROM NOW, WHEN WE DO OUR CLOSING  
12 ARGUMENT. AND AT THAT TIME, EITHER I OR ONE OF MY COLLEAGUES,  
13 DAVID BOIES, WHO'S UNABLE TO BE WITH US HERE TODAY, WILL GET UP  
14 AND MAKE THAT CLOSING ARGUMENT TO YOU. YOU'LL BE SEEING A LOT  
15 OF MR. BOIES DURING THE TRIAL.

16 I ALSO WANTED TO INTRODUCE TO YOU A COUPLE OF FOLKS  
17 THAT I DID NOT INTRODUCE TO YOU YESTERDAY. SITTING HERE IN THE  
18 FRONT ROW IN THE CORNER IS SAFRA CATZ.

19 MS. CATZ, WOULD YOU STAND UP SO THE JURY CAN SEE YOU?

20 MS. CATZ IS THE PRESIDENT OF ORACLE. SHE'LL BE ONE  
21 OF OUR CORPORATE REPRESENTATIVES. IN ADDITION TO THAT  
22 MS. RANSOM, YOU'LL SEE HER HERE MANY DAYS DURING THE COURT OR  
23 TRIAL. AND SITTING NEXT TO HER IS DORIAN DALEY, OUR GENERAL --  
24 ORACLE'S GENERAL COUNSEL.

25 NOW, WHAT I'D LIKE TO DO WITH YOU THIS MORNING IS

1 GIVE YOU SOME BACKGROUND ABOUT THE PARTIES, EXPLAIN TO YOU A  
2 LITTLE BIT ABOUT THE SOFTWARE, AND SOME OF THE ISSUES THAT ARE  
3 INVOLVED IN THE CASE AND TELL YOU ABOUT THE COMPETITIVE  
4 RELATIONSHIP BETWEEN ORACLE AND SAP THAT REALLY IS PART OF WHAT  
5 BRINGS US HERE TODAY.

6 GO THROUGH WITH YOU SOME OF THE EVIDENCE, NOT VERY  
7 LONG, BUT SOME OF THE EVIDENCE THAT LED TO THE STIPULATIONS OF  
8 LIABILITY THAT YOU'VE HEARD ABOUT. AND THEN WE'LL GET RIGHT TO  
9 DAMAGES AND SHOW YOU SOME -- WHAT WE THINK THE EVIDENCE WILL  
10 SHOW AND THE EVIDENCE THAT YOU WILL BE CONSIDERING AS YOU THINK  
11 ABOUT THE DIFFERENT FACTORS THAT GO INTO DECIDING THE DAMAGES.

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 **MR. HOWARD:** SO ORACLE AND SAP ARE BOTH SOFTWARE  
14 COMPANIES. THEY'RE BOTH LARGE SOFTWARE COMPANIES, AND THEY  
15 COMPETE IN DEVELOPING VERY COMPLEX BUSINESS SOFTWARE. THIS IS  
16 THE SOFTWARE THAT BUSINESSES OF ALL SIZES AND SHAPES USE TO RUN  
17 THEIR BUSINESSES, DO ALL KINDS OF THINGS TO AUTOMATE THEIR  
18 PROCESSES, MAKE DECISIONS, REMAIN COMPETITIVE IN THE MARKETPLACE  
19 THAT THEY'RE IN.

20 GOING BACK TO 2004, ORACLE WAS A LARGER COMPANY  
21 OVERALL WITH A BROAD, BROAD SUITE OF PRODUCTS THAT IT PROVIDED.  
22 BUT IN THE SOFTWARE THAT WE'RE MOSTLY CONCERNED ABOUT HERE,  
23 WHICH IS ENTERPRISE APPLICATION SOFTWARE, SAP WAS BY FAR AND  
24 AWAY THE WORLD'S DOMINANT SELLER AND MAKER OF THAT SOFTWARE, AND  
25 THAT'S TRUE EVEN NOW.

1 WE TALKED ABOUT ENTERPRISE APPLICATION SOFTWARE.  
2 LET'S TALK ABOUT WHAT THAT IS. ENTERPRISE APPLICATION SOFTWARE  
3 IS THE SOFTWARE THAT BUSINESSES USE FOR ALL OF THE DIFFERENT  
4 KINDS OF THINGS THAT THEY DO. IT MIGHT BE FINANCIAL SOFTWARE  
5 WHICH THEY USE TO CREATE FINANCIAL REPORTS THAT THEY HAVE TO  
6 PROVIDE TO GOVERNMENT REGULATORS OR AGENCIES OR TO BALANCE THEIR  
7 BOOKS OR TO CREATE REPORTS.

8 IT MIGHT BE WHAT'S -- THEY CALL HUMAN RESOURCES  
9 SOFTWARE, WHICH IS WHAT THEY MIGHT USE TO DO THEIR PAYROLL. AND  
10 IF YOU THINK ABOUT VERY LARGE BUSINESSES, VERY LARGE COMPANIES,  
11 THEY MAY HAVE -- THEY MAY HAVE 50,000 EMPLOYEES, THEY MAY HAVE A  
12 HUNDRED THOUSAND EMPLOYEES, THEY MAY HAVE HUNDREDS OF THOUSANDS  
13 OF CUSTOMERS. THEY MAY HAVE OFFICES ALL OVER THE COUNTRY AND  
14 ALL OVER THE WORLD.

15 AND YOU THINK ABOUT JUST THE BASIC NECESSITY OF  
16 RUNNING A PAYROLL FOR AN OPERATION OF THAT SIZE, YOU'VE GOT  
17 PAYCHECKS IN DIFFERENT JURISDICTIONS, TAX WITHHOLDINGS, YOU'VE  
18 GOT MEDICAL LEAVES, YOU MAY HAVE JURY SERVICE, ALL KINDS OF  
19 DIFFERENT THINGS THAT HAVE TO BE TAKEN INTO ACCOUNT IN ORDER TO  
20 RUN THAT PAYROLL. AND IF YOU CAN'T RUN THE PAYROLL AND YOU  
21 CAN'T DO IT IN AN EFFICIENT AND AN EFFECTIVE WAY, ALL KINDS OF  
22 BAD THINGS CAN HAPPEN.

23 SO THAT'S JUST ONE EXAMPLE OF SORT OF THE SIZE AND  
24 THE COMPLEXITY OF THE SOFTWARE.

25 ANOTHER EXAMPLE, IF YOU THINK ABOUT, YOU KNOW, THE

1 THINGS THAT ENTERPRISE APPLICATION SOFTWARE DOES THAT YOU MAY  
2 NOT THINK ABOUT IN THE REGULAR COURSE OF YOUR LIFE. IF YOU GO  
3 INTO A STORE -- SAY YOU GO INTO A GROCERY STORE, AND EVERY TIME  
4 YOU GO INTO THE STORE ON THE SAME AISLE, THERE'S A SAME LOAF OF  
5 BREAD THAT YOU LIKE TO BUY. AND EVERY TIME YOU GO IN THERE,  
6 USUALLY, RIGHT, THERE'S A FEW OF THOSE LOAVES, AND YOU PICK ONE  
7 UP.

8 HOW DOES THAT LOAF OF BREAD GET THERE? WELL, THERE'S  
9 ENTERPRISE APPLICATION SOFTWARE THAT THE STORE USES. LET'S SAY  
10 IT'S SAFEWAY. AND THAT SOFTWARE WILL TELL THEM HOW MANY LOAVES  
11 OF BREAD ARE LEFT, HOW MANY DO THEY NEED, WHAT DO THEY NEED TO  
12 ORDER. THEY CAN PUT AN ORDER IN FOR THEIR INVENTORY. THEY SEND  
13 IT OVER TO THE BAKERY, AND MAYBE IT'S A VERY LARGE BAKERY THAT  
14 SUPPLIES BREAD TO ALL 50 STATES IN THE UNITED STATES.

15 WELL, THAT BAKERY HAS SOFTWARE, TOO, AND THAT  
16 SOFTWARE RECEIVES ORDERS IN FROM THE RETAIL STORES ALL OVER THE  
17 COUNTRY. IT -- THE SOFTWARE HELPS IT DECIDE, WELL, HOW MANY --  
18 HOW MUCH BREAD SHOULD I BAKE. THERE'S SOFTWARE FOR LOGISTICS  
19 THAT TELLS THEM, YOU KNOW, WHAT TRUCKS DO I NEED, WHAT TRAINS DO  
20 I NEED, HOW AM I GOING TO SEND THAT BREAD OUT TO ALL OF THE  
21 RETAIL OUTLETS SO IT'S ON THE SHELF WHEN YOU GO IN THERE? AND  
22 THE SOFTWARE WILL ALLOW THE BAKERY TO SEND OUT INVOICES TO ALL  
23 OF ITS RETAIL CUSTOMERS.

24 THIS IS JUST ONE EXAMPLE, BUT THESE ARE THE THINGS  
25 THAT HAPPEN IN THE BACKGROUND OF OUR LIVES THAT ENTERPRISE

1 APPLICATION SOFTWARE IS HELPING US TO DO. AND IT'S USED ACROSS  
2 A WHOLE WIDE RANGE OF INDUSTRIES: FINANCIAL, BANKING, RETAIL,  
3 HOSPITALS, SCHOOLS, GOVERNMENTS, ALL OF THESE DIFFERENT KINDS  
4 OF -- OF ENTITIES ARE USING THE SOFTWARE TO HELP THEM RUN  
5 BETTER.

6 AS YOU MIGHT EXPECT, SOFTWARE OF THIS KIND OF  
7 COMPLEXITY IS VERY EXPENSIVE.

8 NOW, THESE ARE --

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 **MR. HOWARD:** THIS IS THE SOFTWARE THAT WE'LL BE  
11 TALKING ABOUT IN THE CASE. THESE ARE ALL BRANDS OF SOFTWARE  
12 THAT ORACLE HAS AND THAT ORACLE SELLS. THE FIRST TWO,  
13 PEOPLESOFT AND JD EDWARDS, ORACLE ACQUIRED THAT SOFTWARE WHEN IT  
14 BOUGHT PEOPLESOFT IN EARLY 2005. PEOPLESOFT HAD BOUGHT  
15 JD EDWARDS, AND SO WHEN ORACLE BOUGHT PEOPLESOFT, IT GOT  
16 PEOPLESOFT AND THE JD EDWARDS SOFTWARE TOGETHER IN THAT  
17 TRANSACTION.

18 A LITTLE BIT LATER ON -- AND I'LL BE TALKING ABOUT  
19 THIS AS WE GO THROUGH TODAY -- ORACLE BOUGHT SIEBEL. AND SO IT  
20 ALSO HAS THE SIEBEL BRAND OF SOFTWARE.

21 AND THEN THE LAST IS THE ORACLE DATABASE SOFTWARE.  
22 THAT'S THE DATABASE THAT ORACLE HAS DEVELOPED AND SELLS.

23 NOW, BECAUSE ENTERPRISE APPLICATION SOFTWARE IS SO  
24 COMPLEX. IT REQUIRES AN ENORMOUS AMOUNT OF SUPPORT IN ORDER TO  
25 KEEP IT RUNNING, IN ORDER TO KEEP IT COMPLIANT PERHAPS WITH THE



1 TAX LAWS THAT CHANGE, THE WITHHOLDING RATES, SO THAT BUSINESSES  
2 CAN RUN THEIR PAYROLLS, PERHAPS THERE'S UPDATES.

3 ORACLE IS CONSTANTLY WORKING -- AND ALL SOFTWARE  
4 COMPANIES -- CONSTANTLY WORKING TO MAINTAIN THAT SOFTWARE TO  
5 IMPROVE IT, TO MAKE IT BETTER, AND THEY SEND OUT UPDATES TO IT,  
6 VERY SIMILAR TO IF YOU'RE FAMILIAR WITH CONSUMER SOFTWARE LIKE  
7 WORD OR ADOBE, SOMETIMES YOU GET A LITTLE MESSAGE ON YOUR SCREEN  
8 THAT THERE'S AN UPDATE OR SOMETHING TO DOWNLOAD. THAT'S AN  
9 EXAMPLE. BUT FOR ENTERPRISE APPLICATION SOFTWARE, IT HAPPENS AT  
10 A MUCH VASTER SCALE AND IT'S A PERPETUAL, CONSTANT PROCESS.

11 AND THE SOFTWARE COMPANIES PROVIDE THAT SUPPORT FOR A  
12 FEE. IT'S -- IT'S A PAID FEE, LIKE A SUBSCRIPTION EVERY YEAR  
13 THAT COMPANIES PAY SEPARATE FROM THE LICENSE THAT THEY PAY FOR  
14 THE SOFTWARE IN ORDER TO HAVE ALL OF THAT SUPPORT THAT THE  
15 SOFTWARE COMPANIES ARE MAKING (SIC).

16 AND THE -- AND THE FEE IS IMPORTANT, AND IT'S GOING  
17 TO BE VERY IMPORTANT IN THIS CASE. ONE REASON FOR IT IS IT'S  
18 VERY EXPENSIVE TO MAINTAIN THE SOFTWARE. IF YOU THINK ABOUT HOW  
19 BIG IT IS AND HOW COMPLEX IT IS AND HOW IMPORTANT IT IS TO  
20 BUSINESSES, IT'S GOT TO BE -- IT'S GOT TO BE RUNNING THE RIGHT  
21 WAY, AND IT'S GOT TO BE KEPT CURRENT.

22 AND ORACLE, FOR EXAMPLE, HAS THOUSANDS OF EMPLOYEES  
23 WHOSE JOB IT IS TO WORK ON THOSE SUPPORT PRODUCTS, WHETHER  
24 THEY'RE UPDATES OR THEY'RE FIXES, OR SOMETIMES THEY TAKE THE  
25 FORM OF DOCUMENTATION THAT EXPLAINS HOW TO SOLVE A PARTICULAR

1 PROBLEM -- THOUSANDS OF PEOPLE WHO ARE WORKING ON THOSE ALL THE  
2 TIME, AND IN ADDITION TO WORKING ON DEVELOPING THE NEXT RELEASE  
3 OF WHATEVER SOFTWARE THAT IS OR THE NEXT GREATEST PRODUCT THAT  
4 THEY'RE GOING TO PUT OUT INTO THE MARKET.

5 AND THE CUSTOMERS VALUE THESE SUPPORT PRODUCTS VERY  
6 HIGHLY, AS YOU CAN IMAGINE. AND THEY PAY FOR THEM ANYWHERE FROM  
7 A FEW THOUSANDS OF DOLLARS TO A FEW MILLIONS OF DOLLARS EVERY  
8 YEAR DEPENDING ON HOW MUCH THEY HAVE AND THE SIZE AND THE SCOPE  
9 OF THE BUSINESS.

10 NOW, THE SOFTWARE -- THE SUPPORT IS VALUABLE TO  
11 ORACLE FOR THE REVENUE THAT IT GENERATES BECAUSE IT'S REALLY  
12 THAT -- THOSE FEES, THE FEES THAT CUSTOMERS PAY FOR SUPPORT  
13 EVERY YEAR, THAT ORACLE USES TO REINVEST INTO ITS BUSINESS, TO  
14 PAY THE THOUSANDS OF DEVELOPERS WHO ARE WORKING ON DEVELOPING  
15 THE SUPPORT AND WORKING ON DEVELOPING THE NEXT GENERATION OF THE  
16 PRODUCT.

17 THAT'S THE RESEARCH AND DEVELOPMENT THAT SOFTWARE  
18 COMPANIES ARE CONSTANTLY DOING IN ORDER TO STAY COMPETITIVE, IN  
19 ORDER TO IMPROVE.

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 **MR. HOWARD:** NOW, ORACLE AND SAP, THEY'RE NOT THE  
22 ONLY ONES THAT PROVIDE SUPPORT FOR THEIR PRODUCTS. THERE IS  
23 SOMETHING CALLED THIRD-PARTY SUPPORT. THIRD-PARTY SUPPORT IS A  
24 SEPARATE COMPANY -- THEY MAY BE SEPARATE COMPANIES, AND THE  
25 DEFENDANT TOMORROWNOW WAS ONE OF THOSE COMPANIES.

1           THEY PROVIDE SOME OF THE THINGS THAT ORACLE OR SAP  
2       MAY PROVIDE, OR AT LEAST IF THEY'RE DOING IT THE RIGHT WAY, BUT  
3       WITHOUT ACCESS TO THE INTELLECTUAL PROPERTY, WITHOUT ACCESS TO  
4       THE UNDERLYING SOFTWARE. THERE'S A LIMIT ON WHAT THE  
5       THIRD-PARTY SUPPORT PROVIDERS CAN DO.

6           TOMORROWNOW WAS STARTED AS A THIRD-PARTY SUPPORT  
7       PROVIDER FOR PEOPLESOFT SOFTWARE BY SOME FORMER PEOPLESOFT  
8       EMPLOYEES WHO LEFT THE COMPANY AND STARTED TOMORROWNOW. AND IT  
9       WAS PROVIDING SUPPORT FOR PEOPLESOFT AND FOR JD EDWARDS AT THE  
10      TIME THAT SAP BOUGHT IT IN EARLY 2005. THE DIFFERENCE WAS --  
11      AND THE WAY TOMORROWNOW WORKED, THE EVIDENCE WILL TELL YOU AS WE  
12      GO THROUGH THE CASE -- THE WAY TOMORROWNOW SOLD ITS SERVICES IS  
13      IT SAID, WHATEVER YOU'RE PAYING ORACLE -- SAID TO THE CUSTOMERS  
14      OF THE SOFTWARE, WHATEVER YOU'RE PAYING ORACLE, WE'LL ONLY  
15      CHARGE YOU HALF OR LESS SOMETIMES.

16           WELL, THE EVIDENCE WILL SHOW THAT THE ONLY WAY THEY  
17      COULD DO THAT, 'CAUSE THEY DIDN'T HAVE THE THOUSANDS OF  
18      DEVELOPERS THAT ORACLE HAD PROVIDING SUPPORT -- THE ONLY WAY  
19      THEY COULD DO THAT AND NOT PAY ALL THOSE DEVELOPERS WAS TO USE  
20      THE COPYRIGHTED SOFTWARE.

21                   (DEMONSTRATIVE PUBLISHED TO JURY.)

22           **MR. HOWARD:** NOW, LET'S TALK A LITTLE BIT ABOUT THE  
23      PARTIES AND ORACLE. ORACLE WAS FOUNDED BY THREE PEOPLE IN 1977.  
24      LARRY ELLISON ONE OF THE FOUNDERS, AND HE'S BEEN ITS C.E.O.  
25      SINCE ITS INCEPTION AND STILL IS TODAY. YOU'LL HEAR FROM

1 MR. ELLISON TODAY (SIC). HE'LL BE A WITNESS AS WE PUT ON OUR  
2 EVIDENCE.

3 AND ORACLE'S GREAT CONTRIBUTION TO THE TECHNOLOGY  
4 THAT WE LIVE WITH TODAY WAS ITS RELATIONAL DATABASE. THE  
5 RELATIONAL DATABASE IS ONE OF THE GREAT TECHNOLOGICAL  
6 INNOVATIONS OF THE 20TH CENTURY. IT'S NOT SOMETHING THAT YOU  
7 ENCOUNTER UNLESS YOU WORK WITH ORACLE DATABASE, BUT IT'S NOT  
8 SOMETHING YOU ENCOUNTER IN YOUR EVERYDAY LIFE, BUT IT HAS  
9 FUNDAMENTALLY CHANGED THE WAY ALL OF US LIVE OUR LIVES.

10 IT IS -- AND THE -- THE INNOVATION THAT THE DATABASE  
11 REPRESENTS IS THE ABILITY TO STORE INCREDIBLE, ALMOST  
12 MIND-BOGGLING AMOUNTS OF DATA, BILLIONS OF RECORDS. THIS  
13 INFORMATION IS SOMETIMES THE MOST PRIZED INFORMATION THAT A  
14 COMPANY HAS AND THE MOST DELICATE, SENSITIVE INFORMATION THAT  
15 THAT COMPANY HAS.

16 THE DATABASE IS ABLE TO STORE IT SECURELY. IT'S ABLE  
17 TO STORE IT SAFELY, AND THE RELATIONAL ASPECT OF IT, WHICH WAS  
18 THIS INCREDIBLE INNOVATION, ALLOWS YOU TO RELATE THE DATA PARTS  
19 OF IT TO OTHER PARTS OF IT.

20 SO AS AN EXAMPLE, IF YOU'RE INTERESTED IN REAL ESTATE  
21 AND YOU'RE GOING OUT AND YOU'RE LOOKING FOR HOUSES. YOU CAN  
22 SORT NOW AND -- YOU CAN SORT -- I WANT TO SEE WHAT ALL THE SALES  
23 PRICES ARE FOR THE HOUSES, BUT I WANT TO SEE IT JUST BY THIS ZIP  
24 CODE. RIGHT? YOU'RE RELATING DATA TO EACH OTHER. THAT SEEMS  
25 SO SIMPLE. IT ALMOST SEEMS SO COMMON SENSE.

1 BUT THIS WAS THE AMAZING INNOVATION THAT ORACLE DID,  
2 AND IT HAS ALLOWED IT TO GROW AND BECOME A VERY SUCCESSFUL  
3 COMPANY.

4 IT BEGAN OFFERING APPLICATION SOFTWARE IN 1987. AND  
5 EVER SINCE -- IT'S CURRENTLY HEADQUARTERED IN REDWOOD CITY, HAS  
6 OVER A HUNDRED THOUSAND EMPLOYEES AROUND THE WORLD, INCLUDING  
7 12,000 HERE IN THE BAY AREA.

8 AND HERE ARE SOME OF THE FOLKS YOU'LL HEAR FROM IN  
9 ORACLE. I MENTIONED MR. ELLISON. YOU MET MS. CATZ EARLIER THIS  
10 MORNING. CHARLES PHILLIPS FOR ALL OF THE RELEVANT TIME IN THIS  
11 CASE WAS A COPRESIDENT AT ORACLE. HE'S RECENTLY LEFT TO TAKE A  
12 JOB AS A C.E.O. AT ANOTHER COMPANY, BUT HE HAS AGREED TO COME  
13 BACK FROM THE EAST COAST AND TESTIFY HERE TODAY, EVEN THOUGH HE  
14 JUST TOOK A JOB AS A C.E.O. OF ANOTHER COMPANY. AND YOU'LL HEAR  
15 FROM HIM LATER THIS WEEK.

16 MR. SCREVEN IS ORACLE'S CHIEF CORPORATE ARCHITECT,  
17 AND YOU'VE MET MS. RANSOM EARLIER TODAY -- YESTERDAY.

18 (DEMONSTRATIVE PUBLISHED TO JURY.)

19 **MR. HOWARD:** ALL RIGHT. NOW, WHO'S SAP? SAP WAS  
20 FOUNDED IN 1972 IN GERMANY. IT'S A GERMAN COMPANY. IT'S ONE OF  
21 WORLD'S LARGEST SOFTWARE COMPANIES. AND AS I MENTIONED, IT IS  
22 THE WORLD'S LARGEST BY FAR IN ENTERPRISE APPLICATION SOFTWARE.  
23 IT'S ALWAYS -- VIRTUALLY ALWAYS BEEN THE DOMINANT COMPANY IN  
24 THAT MARKET.

25 (DEMONSTRATIVE PUBLISHED TO JURY.)

1                   **MR. HOWARD:**   THIS WAS THE EXECUTIVE BOARD OF  
2 DIRECTORS AT SAP AG AT THE TIME THAT SAP MADE THE DECISION TO  
3 BUY TOMORROWNOW.   AND YOU'RE GOING TO HEAR FROM EACH OF THEM IN  
4 THE CASE.

5                   MR. AGASSI WAS ONE OF THE LEADING INDIVIDUALS IN  
6 DECIDING TO BUY TOMORROWNOW.   MR. APOTHEKER, VERY INVOLVED IN  
7 THAT TRANSACTION AND VERY INVOLVED IN TOMORROWNOW AFTERWARDS.  
8 MR. BRANDT IS SITTING HERE WITH US TODAY.   YOU'LL HEAR FROM  
9 THESE FOLKS EITHER LIVE OR BY VIDEO DEPOSITION, THEIR SWORN  
10 TESTIMONY THAT THEY GAVE BEFORE WE GOT TO TRIAL HERE.

11                   (DEMONSTRATIVE PUBLISHED TO JURY.)

12                   **MR. HOWARD:**   YOU'LL ALSO HEAR FROM SOME OTHER SAP  
13 EXECUTIVES.   ANDREW NELSON, FOR EXAMPLE, WAS THE FOUNDER OF  
14 TOMORROWNOW.   HE BECAME AN SAP AMERICA VICE-PRESIDENT AFTER THE  
15 ACQUISITION BY SAP.   AND -- AND YOU'LL HEAR FROM SOME OF THE  
16 OTHER FOLKS THAT ARE HERE AS WE GO THROUGH THE CASE.

17                   MARK WHITE YOU MET YESTERDAY, IS ONE OF THEIR  
18 CORPORATE REPRESENTATIVES, WAS VERY INVOLVED IN THE ACQUISITION  
19 OF TOMORROWNOW ON THE SAP SIDE.

20                   (DEMONSTRATIVE PUBLISHED TO JURY.)

21                   **MR. HOWARD:**   WE TALKED ABOUT THE MAINTENANCE SUPPORT  
22 FEES THAT CUSTOMERS PAY.   AND I TOLD YOU THAT MAINTENANCE WAS  
23 IMPORTANT BECAUSE THAT'S HOW ORACLE DEVELOPS THE SUPPORT FOR THE  
24 PRODUCTS AND BUILDS THE NEXT VERSION OF THE SOFTWARE.   AND IT'S  
25 NOT A SMALL NUMBER.   ORACLE INVESTS BILLIONS OF DOLLARS EVERY

1 YEAR INTO ITS PRODUCTS, BILLIONS OF DOLLARS EVERY YEAR INTO  
2 DEVELOPING ITS SOFTWARE. AND YOU CAN SEE THAT IT INCREASES THAT  
3 AMOUNT, \$3.3 BILLION THIS YEAR, \$4 BILLION IN THE NEXT FISCAL  
4 YEAR.

5 (DEMONSTRATIVE PUBLISHED TO JURY.)

6 **MR. HOWARD:** ONE THING THAT'S NOT IN DISPUTE IN THIS  
7 CASE IS THAT FOR SOFTWARE COMPANIES, THE INTELLECTUAL PROPERTY  
8 THAT THEY CREATE, THE SOFTWARE THAT THEY HAVE, IS REALLY THE  
9 FUNDAMENTAL VALUE OF THEIR COMPANIES.

10 MR. APOTHEKER, SAP EXECUTIVE BOARD MEMBER, AGREES.  
11 THE ENTIRE SOFTWARE INDUSTRY WAS CREATED ON IP RIGHTS.

12 MR. AGASSI, SAME THING. AT SAP WE BELIEVE THAT  
13 WITHOUT THE ABILITY TO PROTECT IP, INTELLECTUAL PROPERTY, MOST  
14 COMPANIES WILL NO LONGER INVEST SO MUCH OF THEIR CURRENT  
15 REVENUES IN FUTURE PRODUCT INNOVATION.

16 IT'S THE INTELLECTUAL PROPERTY, AND YOU'LL HEAR THE  
17 WITNESSES, AND THE EVIDENCE WILL SHOW THAT IT'S THAT  
18 INTELLECTUAL PROPERTY PROTECTION THAT GIVES THE COMPANIES THE  
19 ABILITY TO GO OUT AND CONTINUE TO INVEST AND BUILD NEW PRODUCTS.

20 NOW, IF YOU THINK ABOUT A SOFTWARE COMPANY HAS  
21 BUILDINGS, HAS COMPUTERS, HAS OTHER ASSETS. NONE OF THOSE  
22 REALLY MATTER, RIGHT? NONE OF THOSE ARE DISTINCT. THEY CAN BE  
23 REPLACED. WHAT'S VALUABLE IS WHAT'S IN THE MINDS OF THEIR  
24 EMPLOYEES AND THE CREATIVITY OF THE DEVELOPERS AND THE INVENTORS  
25 AND THE ENGINEERS THAT THEY HAVE WHO SIT THERE EVERY DAY, YOU

1 KNOW, AT A SCREEN AND THINK ABOUT HOW CAN I MAKE THE NEXT GREAT  
2 PRODUCT. HOW CAN I MAKE THAT BETTER.

3 THAT'S THE VALUE IN THESE COMPANIES. THAT'S WHAT  
4 MAKES THEM DIFFERENT.

5 (DEMONSTRATIVE PUBLISHED TO JURY.)

6 **MR. HOWARD:** I TOLD YOU THAT ORACLE WAS QUITE A BIT  
7 SMALLER THAN SAP IN 2004 IN ENTERPRISE APPLICATION SOFTWARE.  
8 ORACLE HAD TRIED, AND THE EVIDENCE WILL SHOW, THAT ORACLE HAD  
9 TRIED TO CATCH UP. AND IT DECIDED THAT ONE OF THE WAYS THAT IT  
10 COULD BE MORE COMPETITIVE WITH SAP WAS TO BUY PEOPLESOFT. WHEN  
11 IT DID THAT, SAP, WHICH HAD LONG BEEN THE DOMINANT PLAYER IN  
12 THAT MARKET, FELT VERY THREATENED.

13 ORACLE -- THE EVIDENCE WILL SHOW THAT ORACLE'S  
14 PURCHASE OF PEOPLESOFT WAS A RISK, AND IT WAS A VERY BIG  
15 DECISION FOR ORACLE. THEY PAID OVER \$11 BILLION FOR PEOPLESOFT.  
16 EVEN TO THIS DAY, YOU'LL HEAR THE LARGEST ACQUISITION THAT  
17 ORACLE HAS EVER MADE, AND THEY'VE MADE A FEW.

18 PEOPLESOFT AT THE TIME WAS A COMPANY WITH ALMOST  
19 \$3 BILLION IN ANNUAL REVENUES. AND -- AND THIS IS VERY  
20 IMPORTANT -- PEOPLESOFT HAD ALMOST 10,000 CUSTOMERS. AND THE  
21 EVIDENCE WILL SHOW THAT THESE CUSTOMERS -- AND I'VE TALKED ABOUT  
22 THE MAINTENANCE FEES THAT THESE CUSTOMERS PAY, SO WHAT ORACLE IS  
23 GETTING FOR ITS \$11 BILLION IN PART IS THE 10,000 CUSTOMERS THAT  
24 PEOPLESOFT HAS, ALL OF THOSE CUSTOMERS PAYING MAINTENANCE FEES,  
25 ALL OF THOSE MAINTENANCE FEES ABLE TO BE USED TO PAY FOR THE



1 TRANSACTION, TO PAY FOR THE DEAL, AND TO INVEST IN NEW PRODUCT.

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 **MR. HOWARD:** WHEN ORACLE COMBINED WITH PEOPLESOFT,

4 WHAT DID IT GET? WELL, IT GOT PEOPLESOFT'S INTELLECTUAL

5 PROPERTY. IT GOT THE PEOPLESOFT AND THE JD EDWARDS SOFTWARE.

6 IT GOT THE ALMOST 10,000 CUSTOMERS. IT GOT RELATIONSHIPS WITH

7 THOSE CUSTOMERS. AND THAT'S IMPORTANT.

8 AND IF YOU THINK ABOUT HOW COMPLEX THIS SOFTWARE IS,

9 HOW MANY DIFFERENT PLACES THAT A COMPANY MAY HAVE IT, COMPANIES

10 DON'T EASILY THE EVIDENCE WILL SHOW -- THEY DON'T EASILY DECIDE

11 THAT THEY'RE GOING TO TAKE THEIR 50,000 EMPLOYEES AND THEIR

12 HUNDRED THOUSAND COMPUTERS, AND THEY'RE JUST GOING TO PUT NEW

13 SOFTWARE ON IT. THAT'S EXPENSIVE.

14 IT'S EXPENSIVE FOR THE SOFTWARE. IT'S EXPENSIVE TO

15 INSTALL IT AND IMPLEMENT IT. IT'S EXPENSIVE TO TRAIN ALL OF

16 THOSE EMPLOYEES AGAIN. SO WHEN YOU GET THOSE CUSTOMERS, YOU GET

17 RELATIONSHIPS WITH THOSE CUSTOMERS THAT YOU GENERALLY EXPECT ARE

18 GOING TO GO ON FOR QUITE SOME TIME.

19 IT ACHIEVED ECONOMIES OF SCALE. IT OBVIOUSLY

20 INCREASED IN MARKET SHARE. IT MADE -- IT HELPED IT CATCH UP TO

21 WHERE SAP WAS, AND IT HAD THAT MONEY -- THE MAINTENANCE MONEY TO

22 PUT INTO R & D.

23 (DEMONSTRATIVE PUBLISHED TO JURY.)

24 **MR. HOWARD:** THIS IS WHAT THE MARKET LOOKED LIKE IN

25 2004 BEFORE ORACLE BOUGHT PEOPLESOFT. YOU CAN SEE SAP WAY UP

1 THERE, 57 PERCENT. ORACLE AND PEOPLESOFT KIND OF TIED FOR  
2 SECOND WAY DOWN THERE AT ABOUT 12 PERCENT.

3 NOW, AFTER THE ACQUISITION, SAP IS STILL FAR AND  
4 AWAY, AS I SAID, THE MORE DOMINANT PLAYER. BUT FOR THE FIRST  
5 TIME -- REALLY, FOR THE FIRST TIME IN THE HISTORY OF ENTERPRISE  
6 APPLICATION SOFTWARE, ORACLE IS STARTING TO CATCH UP. AND  
7 YOU'LL HEAR EVIDENCE THAT THIS IS WHAT SAP REGARDED AS A THREAT.

8 SO THESE TWO COMPANIES HAVE A CHOICE. THEY EACH HAVE  
9 A CHOICE IN JANUARY OF 2005.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 **MR. HOWARD:** THE EVIDENCE WILL SHOW THAT THEY EACH  
12 TOOK A RISK. THE RISK ORACLE TOOK WAS AN 11 BILLION-DOLLAR  
13 RISK. AND IT WAS BETTING THAT IT COULD KEEP THOSE CUSTOMERS  
14 HAPPY, THAT IT COULD INTEGRATE THE PEOPLESOFT PRODUCTS INTO ITS  
15 PRODUCT LINE, AND THAT IT COULD CREATE A COMPANY THAT COULD  
16 COMPETE WITH SAP.

17 SAP ALSO TOOK A RISK. AND IT HAD A CHOICE. IT COULD  
18 HAVE CHOSEN TO COMPETE FAIRLY. THE EVIDENCE WILL SHOW THAT  
19 INSTEAD, IT CHOSE TO BUY TOMORROWNOW, A COMPANY THAT THE BOARD  
20 OF DIRECTORS AT SAP KNEW WAS INFRINGING ORACLE'S SOFTWARE.

21 AND THEY CHOSE TO TAKE THAT RISK BECAUSE THEY  
22 EXPECTED TO MAKE ENORMOUS AMOUNTS OF MONEY, WHICH IS SOMETHING  
23 THAT YOU'LL TAKE INTO ACCOUNT IN DECIDING THE AMOUNT OF DAMAGES  
24 AND IT EXPECTED TO INFLICT ENORMOUS HARM ON ORACLE USING  
25 ORACLE'S OWN INTELLECTUAL PROPERTY.

(DEMONSTRATIVE PUBLISHED TO JURY.)

**MR. HOWARD:** NOW, YOU'RE NOT HERE TO DECIDE THE FACTS OF LIABILITY SO WE DON'T HAVE TO GO THROUGH ALL OF THEM BECAUSE THERE HAVE BEEN SOME ADMISSIONS. AND I WANT TO COVER THAT BRIEFLY WITH YOU, AND WE'LL GET TO THE DAMAGES, SPECIFIC DAMAGES EVIDENCE.

(DEMONSTRATIVE PUBLISHED TO JURY.)

**MR. HOWARD:** THE FIRST ADMISSION OF LIABILITY HAPPENED THE DAY AFTER ORACLE BROUGHT THIS LAWSUIT ON MARCH 22ND, 2007, ALMOST THREE AND A HALF YEARS AGO. WE DIDN'T KNOW ABOUT IT AT THE TIME. BUT THIS IS THE DAY AFTER THE LAWSUIT IS FILED, AND THIS IS ONE OF THOSE INSTANT MESSAGE CHATS THAT YOU HEARD THE COURT REFER TO IN THE PRELIMINARY INSTRUCTIONS THAT WERE PRODUCED A LITTLE WHILE AGO.

THIS IS A CHAT BETWEEN TWO EMPLOYEES AT TOMORROWNOW, KIMBERLY MARTINEZ AND KRISTIN PAIGE. DAY AFTER.

"KIMBERLY MARTINEZ: WE ARE GETTING SUED.

"KRISTIN PAGE: I KNOW. I AM READING THE LAWSUIT."

KIMBERLY SAYS, "I HAVE NOT DONE THAT YET."

KRISTIN SAYS, "IT'S LONG."

KIMBERLY SAYS, "WHAT ARE THEY SAYING IN A NUTSHELL?"

KRISTEN SAYS, "THAT WE ILLEGALLY DOWNLOADED THEIR STUFF, USED FALSE INFORMATION AND CUSTOMER I.D. PASSWORD TO GET IT."

KIMBERLY RESPONDS, "WELL, THAT'S TRUE."

1 KIMBERLY SAYS, "WONDER WHO ON THE INSIDE TOLD?"

2 KRISTIN SAYS, "I THINK THEY CAUGHT US. GOT THE BRIAN  
3 IP ADDRESS."

4 NOW, THAT WAS THE FIRST ADMISSION.

5 A FEW WEEKS AGO AS WE WERE GETTING READY FOR TRIAL,  
6 THERE WERE SOME ADDITIONAL STIPULATIONS. YOU HEARD THE COURT  
7 REFER TO THOSE. THAT'S A FANCY LAWYER WORD FOR AGREEMENTS. YOU  
8 ALL NOW HAVE A JURY NOTEBOOK, AND IN THAT NOTEBOOK, YOU HAVE  
9 SEVERAL OF THE STIPULATIONS THAT THE PARTIES HAVE NOW REACHED.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 **MR. HOWARD:** AND THERE'S A TABLE OF CONTENTS AT THE  
12 BEGINNING, AND IN THE SECOND TAB THERE, THERE'S WHAT'S CALLED  
13 "AMENDED TRIAL STIPULATION AND ORDER 1 REGARDING LIABILITY," AND  
14 THERE'S NO. 2, AND THERE'S A NO. 3. THERE'S BEEN A PROGRESSION  
15 OF THESE, AS WE'VE GONE THROUGH -- AND JUST YESTERDAY OR TODAY,  
16 FEW DAYS AGO, THERE WAS A FINAL ONE WHICH WAS THE STIPULATION  
17 TO -- SAP'S STIPULATION TO CONTRIBUTORY COPYRIGHT INFRINGEMENT.

18 THERE'S A LOT OF FACTS IN THESE STIPULATIONS, AND  
19 WE'LL BE REFERRING TO THEM AS WE GO THROUGH. BUT I WANTED TO  
20 ORIENT YOU TO THE DIFFERENT DOCUMENTS AND THE DIFFERENT  
21 STIPULATIONS THAT THEY CONTAIN WHICH HAVE RESULTED IN US BEING  
22 HERE TO TALK ABOUT DAMAGES. AND I'M GOING TO SHOW YOU A LITTLE  
23 BIT ABOUT THEM NOW.

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 **MR. HOWARD:** THIS IS NUMBER ONE. THIS IS A FEW WEEKS

1 AGO. AND IN IT, NUMBER -- STIPULATION NO. 1, TN STIPULATES TO  
2 ALL LIABILITY ON ALL CLAIMS. THEREFORE STIPULATES TO ALL  
3 LIABILITY ON ORACLE'S CLAIMS FOR COPYRIGHT INFRINGEMENT,  
4 VIOLATIONS OF THE FEDERAL COMPUTER FRAUD AND ABUSE ACT. THAT  
5 RELATES TO THE DOWNLOADING. CALIFORNIA'S COMPUTER DATA ACCESS  
6 AND FRAUD ACT. THAT'S A PROVISION OF THE CALIFORNIA PENAL CODE,  
7 ALSO RELATES TO DOWNLOADING. BREACH OF CONTRACT, INTENTIONAL  
8 INTERFERENCE WITH CUSTOMER RELATIONSHIPS, AND A SERIES OF OTHER  
9 CLAIMS.

10 SAP STIPULATES TO VICARIOUS LIABILITY ON THE  
11 COPYRIGHT CLAIMS AGAINST TOMORROWNOW IN THEIR ENTIRETY. IN  
12 ADDITION TO VICARIOUS LIABILITY, THEY'VE ALSO NOW STIPULATED TO  
13 CONTRIBUTORY LIABILITY. THESE ARE NOW ALSO ORDERS OF THE  
14 COURT -- AND YOU'LL SEE THE COURT'S STAMP AT THE END OF  
15 DOCUMENTS IN YOUR BINDER. SO --

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 **MR. HOWARD:** THE GOOD NEWS IS THAT IF THERE WEREN'T  
18 THESE STIPULATIONS, WE WOULD HAVE TO TAKE A LOT MORE TIME TO GO  
19 THROUGH ALL OF THE TECHNICAL LANGUAGE AND ALL OF THE TECHNOLOGY  
20 INVOLVED, AND WE'D HAVE TO TAKE A FAIR AMOUNT OF TIME TO EXPLAIN  
21 THAT. AND YOU WILL STILL HEAR SOME OF THESE TERMS AT THE EDGES,  
22 BUT WITH LIABILITY BEHIND US, REALLY WHAT'S REQUIRED NOW IS FOR  
23 THE JURY TO BRING ITS COMMON SENSE TO THINK ABOUT NOW, WHAT  
24 SHOULD THE DAMAGES BE FOR THAT LIABILITY.

25 AND SO WHAT I'D LIKE TO DO NOW IS GO THROUGH THE

1 EVIDENCE THAT WE THINK WE'LL SHOW AND THAT WILL BE CONSIDERED IN  
2 CALCULATING WHAT THOSE DAMAGES ARE.

3 (DEMONSTRATIVE PUBLISHED TO JURY.)

4 **MR. HOWARD:** IF YOU THINK ABOUT THE EVENTS, JANUARY  
5 OF 2005, ORACLE BUYS PEOPLESFT. AND AS THE EVIDENCE WILL SHOW,  
6 SAP DECIDES TO BUY TOMORROWNOW KNOWING THAT IT'S INFRINGING.

7 IF THERE HAD BEEN -- IF THERE HAD BEEN A NEGOTIATION,  
8 THE WAY THE SOFTWARE INDUSTRY WORKS -- YOU'LL HEAR EVIDENCE  
9 ABOUT THIS -- YOU NEGOTIATE A LICENSE. I MEAN, THAT'S THE WAY  
10 YOU DO IT IN FAIR COMPETITION. YOU SIT DOWN ACROSS THE TABLE  
11 FROM EACH OTHER, LOOK EACH OTHER IN THE EYE, AND SAY, "ALL  
12 RIGHT, I'D LIKE TO USE YOUR SOFTWARE."

13 "GREAT. HOW MUCH?"

14 RIGHT? YOU NEGOTIATE A LICENSE TO IT.

15 IN ORDER TO HAVE BEEN LEGALLY ENTITLED TO DO WHAT  
16 THEY DID, SAP AND TOMORROWNOW NEEDED A LICENSE FROM ORACLE.  
17 THEY NEVER ASKED FOR THAT LICENSE, AND THE EVIDENCE WILL SHOW  
18 THAT THEY NEVER PAID FOR THEIR LICENSE. THE NEGOTIATION NEVER  
19 HAPPENED. SO THE MEASURE -- SO IN THINKING ABOUT WHAT -- WHAT  
20 THAT LICENSE SHOULD HAVE BEEN, WE THINK ABOUT WHAT THE FAIR  
21 MARKET VALUE WAS AT THE TIME THAT THAT HAPPENED AND IN AND  
22 AROUND THAT TIME.

23 THE FAIR MARKET VALUE IS A CONCEPT THAT I THINK  
24 EVERYBODY, YOU KNOW, UNDERSTANDS. IT APPLIES TO A HOUSE. YOU  
25 BUY A HOUSE, THERE'S A MARKET VALUE. SOMETIMES YOU NEGOTIATE.

1 YOU LOOK AT WHAT THE MARKET IS. BUY A CAR, THERE'S A MARKET  
2 VALUE FOR THAT. SAME WITH SOFTWARE. THERE'S A MARKET VALUE FOR  
3 THAT LICENSE.

4 AND THERE ARE SOME FACTORS THAT YOU LOOK AT IN  
5 DECIDING WHAT THAT VALUE IS. HOW IMPORTANT AND VALUABLE DID SAP  
6 EXPECT AT THE TIME? WHAT DID IT EXPECT WHEN IT WOULD HAVE BEEN  
7 SITTING THERE? WHAT DID IT EXPECT TO GET FROM THE COPYRIGHTED  
8 PROPERTY? AND WHAT WOULD ORACLE HAVE EXPECTED TO GET IF IT KNEW  
9 AT THE TIME, A FEW DAYS AFTER IT HAD SPENT \$11 BILLION, THAT IT  
10 WAS GOING TO BE FACING THE DOMINANT PLAYER IN THE SOFTWARE  
11 MARKET USING THE IP THAT IT JUST BOUGHT?

12 WHEN SAP BOUGHT TOMORROWNOW, ITS BOARD OF DIRECTORS  
13 CONSIDERED SOME THINGS. THE EVIDENCE WILL SHOW THAT THEY  
14 CONSIDERED THE ENORMOUS BENEFITS THAT SAP WOULD GET AND THE  
15 ENORMOUS HARM THAT THEY COULD CAUSE ORACLE.

16 AND I'M GOING TO SHOW YOU SAP'S OWN DOCUMENTS.  
17 'CAUSE YOU'LL HEAR FROM WITNESSES, AND THEY'LL SAY WHAT THEY  
18 SAY, BUT WE HAVE WHAT THEY WROTE AT THE TIME. THEY -- WE HAVE  
19 WHAT THEY WROTE DOWN AS THEIR EXPECTATIONS FOR THEMSELVES AND AS  
20 THEIR EXPECTATIONS FOR HOW THEY WOULD HARM ORACLE.

21 AND THOSE DOCUMENTS SHOW THAT THEY EXPECTED BOTH OF  
22 THOSE THINGS, THE BENEFIT TO THEM AND THE HARM TO ORACLE, TO BE  
23 IN THE BILLIONS OF DOLLARS.

24 ORACLE'S OWN DOCUMENTS ALSO SHOW THAT THE VALUE THAT  
25 THEY PUT ON THOSE COPYRIGHTS WAS IN THE BILLIONS OF DOLLARS.

1                   AND WE HAVE TO CONSIDER -- WE HAVE TO CONSIDER ALSO  
2                   IN TAKING ACCOUNT OF VALUE -- YOU HAVE TO CONSIDER THE RISK THAT  
3                   THE -- SAP BOARD OF DIRECTORS -- THE EVIDENCE WILL SHOW THE RISK  
4                   THAT THEY KNEW THAT THEY WERE TAKING, THE RISK OF KNOWINGLY  
5                   INFRINGING ORACLE'S COPYRIGHTS.

6                   FOR A COMPANY LIKE SAP, TO TAKE THE RISK OF BEING  
7                   HERE IN COURT TODAY, HAVING NOW ADMITTED COPYRIGHT INFRINGEMENT,  
8                   THINK THE EVIDENCE WILL SHOW THAT THAT THING, THAT IP MUST HAVE  
9                   BEEN VERY VALUABLE TO THEM.

10                  WHY? WHY WAS IT SO VALUABLE?

11                                 (DEMONSTRATIVE PUBLISHED TO JURY.)

12                  **MR. HOWARD:** THIS DOCUMENT WAS APPROVED BY THE SAP  
13                  BOARD OF DIRECTORS. ONE DAY AFTER THEY ANNOUNCED THE  
14                  ACQUISITION OF TOMORROWNOW. THE GOAL THEY SAY WHAT THEIR GOAL  
15                  IS. THEY WANT TO CONVERT APPROXIMATELY 50 PERCENT OF THE  
16                  PEOPLESOFT AND JD EDWARDS' CUSTOMERS TO SAP. SO THAT ALMOST  
17                  10,000 CUSTOMERS THAT ORACLE WAS GETTING IN ITS \$11 BILLION  
18                  TRANSACTION FOR PEOPLESOFT, THE IDEA WAS LET'S -- WELL, EVIDENCE  
19                  WILL SHOW THAT THEY PLANNED TO TAKE TOMORROWNOW, OFFER THE  
20                  SUPPORT TO THOSE CUSTOMERS, BUT NOW TOMORROWNOW IS SAP, SO THE  
21                  CUSTOMERS ARE SAP CUSTOMERS, AND THEN WE'LL SELL THEM SAP  
22                  SOFTWARE.

23                                 THEY GET THE BENEFIT OF THE CUSTOMERS, ORACLE LOSES  
24                  THE BENEFIT OF THE CUSTOMER. AND THAT THREE -- THREE GOALS:  
25                  DISRUPT ORACLE'S ABILITY TO PAY FOR THE ACQUISITION. SHRINK



1 ORACLE'S SHARE OF THE APPLICATIONS MARKET. REMEMBER THAT GRAPH.  
2 THEY'RE UP TO 23 PERCENT. WE'RE GOING TO PUSH THEM DOWN. AND  
3 DISCREDIT ORACLE'S EFFORTS TO BUILD THE NEXT GREATEST SOFTWARE,  
4 'CAUSE REMEMBER IT COMES OUT OF THE MAINTENANCE FEES THAT --  
5 THAT APPROXIMATELY 50 PERCENT OF THE CUSTOMERS WOULD BE PAYING.

6 SO LET'S PREVENT THAT.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 **MR. HOWARD:** NOW, THERE ARE SOME FACTORS THAT YOU  
9 THINK ABOUT WHEN YOU'RE THINKING ABOUT FAIR MARKET VALUE,  
10 FACTORS THAT EXISTED AT THE TIME THAT DEMONSTRATE THE VALUE OF  
11 LICENSE THAT SAP TOOK FROM ORACLE. AND I'M GOING TO GO THROUGH  
12 EACH OF THESE FACTORS AND THE EVIDENCE THAT WE THINK WILL SHOW  
13 THAT RELATES TO THOSE FACTORS.

14 THE FIRST ONE IS THE SCOPE AND DURATION OF LICENSE.  
15 HOW BROAD IS THE INFRINGEMENT? HOW LONG?

16 THE SECOND ONE IS EACH PARTY'S NEED FOR THE SOFTWARE.  
17 IS THERE SOME OTHER WAY TO ACCOMPLISH THE GOALS THAT THEY SET  
18 OUT FOR THEMSELVES, OR IS THIS THE ONLY WAY? IF IT'S THE ONLY  
19 WAY, IT'S MORE VALUABLE.

20 SAP'S WILLINGNESS TO ASSUME THE RISK OF INFRINGEMENT  
21 LIABILITY. IF THEY WERE WILLING TO ASSUME IT, EVIDENCE WILL  
22 SHOW IT HAS TO BE MORE VALUABLE. THE COMPETITIVE RELATIONSHIP  
23 OF THE PARTIES. WHAT -- WHAT IS THE PURPOSE? HOW ARE THEY  
24 TRYING TO ALTER THAT COMPETITIVE DYNAMIC? WHAT ARE THEIR GOALS  
25 AND BUSINESS PLANS? I SHOWED YOU ONE SLIDE. I'LL SHOW YOU A

1 COUPLE MORE AS WE GO THROUGH.

2 WHAT DID THEY PLAN FOR THIS SOFTWARE IN THE COMPANY?  
3 WHAT DID SAP PLAN TO HAVE TOMORROWNOW NOW DO AS OF JANUARY 2005  
4 WHEN WE VALUED THE SOFTWARE? WHAT FINANCIAL BENEFITS DID SAP  
5 EXPECT TO GET AT THE TIME THAT THEY TOOK THIS RISK? AND WHAT  
6 IMPACTS DID THEY THINK THEY WOULD HAVE ON ORACLE?

7 AND THEN THERE'S OTHER NON-FINANCIAL FACTORS THAT --  
8 THAT WE'LL TOUCH ON AS WE GO THROUGH. THE HARM, THE DISRUPTION  
9 IN THE MARKETPLACE, THAT KIND OF THING.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 **MR. HOWARD:** I HAVE REDUCED THOSE FACTORS TO THIS  
12 HANDY-DANDY COLOR-CODED CHART SO IT'S EASIER TO KEEP TRACK OF  
13 THEM. SCOPE, NEED, RISK TAKEN, COMPETITIVE RELATIONSHIP,  
14 BUSINESS GOALS, FINANCIAL BENEFIT, AND IMPACT. AND AS WE GO  
15 THROUGH THE NEXT FEW SLIDES, WHAT I'VE DONE IS PUT THOSE FACTORS  
16 UP AT THE TOP OF THE SLIDE TO KIND OF HELP YOU THINK ABOUT THE  
17 EVIDENCE THAT WE'RE LOOKING AT AND WHAT IT RELATES TO.

18 NOW, THE TRUTH IS A LOT OF THE EVIDENCE IN THIS CASE  
19 RELATES TO MORE THAN ONE OR SEVERAL OR EVEN SOMETIMES ALL OF  
20 THESE FACTORS. I DIDN'T PUT THEM ALL UP THERE. I PUT A COUPLE  
21 UP THERE TO KIND OF HELP KEEP US ORIENTED. SO LET'S START WITH  
22 THE SCOPE OF SAP'S AND TN'S MISCONDUCT. AGAIN, THIS IS ONE OF  
23 THE TRIAL STIPULATIONS.

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 **MR. HOWARD:** THAT'S IN YOUR BINDER, NOW AN ORDER OF

1 THE COURT. THE STIPULATION GOES THROUGH --

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 **MR. HOWARD:** THIS IS NO. 3. IT GOES THROUGH AND IT  
4 LISTS OUT ALL OF THE DIFFERENT COPIES, ALL OF THE DIFFERENT  
5 DOWNLOADS, AND I THINK THE EVIDENCE WILL SHOW, IN PART FROM THE  
6 STIPULATION AND FROM OTHER THINGS YOU'LL SEE, THAT WHAT  
7 TOMORROWNOW DID WAS IT CREATED A MASTER LIBRARY OF THOUSANDS OF  
8 COPIES OF ORACLE'S ENTERPRISE APPLICATION SOFTWARE, ALL OF THOSE  
9 COPIES STIPULATED TO BE INFRINGING. TOMORROWNOW BUILT A MASTER  
10 LIBRARY OF MILLIONS OF DOWNLOADS FROM ORACLE. MANY OF THOSE ARE  
11 INFRINGING.

12 AND THE WAY TOMORROWNOW WORKED IS THEY WOULD TAKE  
13 THOSE ENVIRONMENTS -- AN ENVIRONMENT IS JUST THE INSTALLATION OF  
14 THE SOFTWARE ON -- THAT TOMORROWNOW KEPT ON ITS COMPUTERS --  
15 THEY WOULD TAKE THE ENVIRONMENTS, THEY WOULD TAKE THE DOWNLOADS,  
16 AND THEN THEY WOULD CREATE DIFFERENT FIXES THAT THEY WOULD SEND  
17 OUT TO CUSTOMERS, THE DIFFERENCE BEING -- ONE OF THE  
18 DIFFERENCES -- THAT THEY DIDN'T REALLY KEEP TRACK OF OR CARE  
19 ABOUT WHOSE SOFTWARE THEY WERE USING.

20 THEY WOULD TAKE SOFTWARE FROM CUSTOMER A, CREATE A  
21 FIX, SEND IT OUT TO SEVERAL DIFFERENT CUSTOMERS. THAT'S  
22 CHEAPER. YOU DON'T HAVE TO PAY FOR ALL THE DEVELOPERS THAT --  
23 THAT ORACLE USES, BUT -- BUT WE CALL THAT CROSS-USE.

24 SO STIPULATION REFERS TO CD BINDERS AND A CD JUKEBOX.  
25 THESE ARE WHAT WE CALL INSTALL MEDIA. THOSE ARE THE CD'S YOU

1 GET. YOU CAN GET THEM -- YOU KNOW, YOU CAN GO INTO BEST BUY AND  
2 BUY WORD. THIS IS THE ENTERPRISE APPLICATIONS VERSION OF THAT  
3 INSTALL MEDIA.

4 (DEMONSTRATIVE PUBLISHED TO JURY.)

5 **MR. HOWARD:** THEY'RE -- TOMORROWNOW HAD RACKS AND  
6 RACKS OF CD BINDERS THAT THEY HAD COPIED THAT THEY GOT FROM  
7 THEIR CUSTOMERS, THEY COPIED THEM, AND THEY KEPT THEM IN THIS  
8 LIBRARY, AND THEY WOULD USE THEM TO INSTALL ENVIRONMENTS ON  
9 THEIR SYSTEM. THERE'S AT LEAST 727 COPIES OF ORACLE'S  
10 ENTERPRISE APPLICATION SOFTWARE IN THERE. SOMETIMES THERE ARE  
11 MORE THAN ONE CD, SEVERAL CD'S. THAT'S STIPULATED. THAT'S AN  
12 AGREED FACT.

13 THE CD JUKEBOX WAS A PLACE ON THEIR NETWORK WHERE  
14 THEY WOULD TAKE THOSE CD'S AND COPY THEM ON TO USE TO INSTALL IN  
15 OTHER ENVIRONMENTS ELSEWHERE. AND IN THESE CD BINDERS AND IN  
16 THIS CD JUKEBOX, ALL OF THE DIFFERENT PRODUCTS THAT YOU SAW,  
17 PEOPLESOFT, JD EDWARDS, ACROSS ALL OF THESE DIFFERENT LOCATIONS  
18 THAT TOMORROWNOW STORED THEM, SIEBEL, ORACLE'S DATABASE  
19 SOFTWARE, ORACLE ALLEGED INFRINGEMENT FOR 120 DIFFERENT  
20 COPYRIGHT REGISTRATIONS, AND THOSE SPANNED ALL OF THESE  
21 DIFFERENT PRODUCTS AND A LOT OF THE SUPPORT PRODUCTS, PATCHES,  
22 AND DOCUMENTATION.

23 THOSE ARE ALL -- IT'S AGREED THAT -- THAT THOSE ARE  
24 ALL INFRINGED.

25 (DEMONSTRATIVE PUBLISHED TO JURY.)

1           **MR. HOWARD:**   OKAY.   SO IN ADDITION TO THE INSTALL  
2 MEDIA, THERE'S COPIES OF THE SOFTWARE ITSELF.   ALMOST 6200  
3 PEOPLESFT ENVIRONMENTS AND MANY, MANY JD EDWARDS, SIEBEL  
4 ENVIRONMENTS, AND COPIES OF THE ORACLE DATABASE SOFTWARE.

5           THIS IS ALL STIPULATED AND NOW THE ORDER OF THE  
6 COURT.   IT'S IN YOUR BINDERS IN STIPULATION NO. 3.

7           (DEMONSTRATIVE PUBLISHED TO JURY.)

8           **MR. HOWARD:**   THAT'S A PICTURE OF THE RACKS OF THE CD  
9 BINDERS THAT -- THAT WERE AT TOMORROWNOW.

10          SO IN ADDITION -- I SAID IN ADDITION TO THE COPIES OF  
11 THE SOFTWARE, TOMORROWNOW ALSO WOULD DOWNLOAD.

12          (DEMONSTRATIVE PUBLISHED TO JURY.)

13          **MR. HOWARD:**   AND THE WAY IT DID THAT -- THE MAIN WAY  
14 IT DID THAT WAS THROUGH A CUSTOM -- I THINK THE EVIDENCE WILL  
15 SHOW THAT'S A SCRAPER.   THEY CALLED IT A WEB SCRAPER.   THEY  
16 CALLED IT TITAN.   THEY BUILT IT.   IT'S A SOFTWARE TOOL, HAD ONE  
17 PURPOSE AND ONE PURPOSE ONLY, AND THAT WAS TO TAKE A CREDENTIAL  
18 FROM SOME CUSTOMER, LOG INTO ORACLE'S WEBSITE, AND JUST DOWNLOAD  
19 AS MUCH AS THEY COULD CONSTANTLY, MILLIONS OF DOWNLOADS.

20          THE USE OF THAT SCRAPER VIOLATED LICENSES, VIOLATED  
21 TERMS OF USE, CAUSED ALL KINDS OF HARM TO ORACLE'S WEBSITE.

22          (DEMONSTRATIVE PUBLISHED TO JURY.)

23          **MR. HOWARD:**   I WANT YOU TO HEAR FROM JOHN RITCHIE.  
24 JOHN RITCHIE IS A FORMER TOMORROWNOW EMPLOYEE.   HE'S THE SENIOR  
25 SERVICE AUTOMATION DEVELOPER AT TOMORROWNOW.   HE WAS HIRED ABOUT

1 A LITTLE OVER A YEAR AFTER SAP BOUGHT TOMORROWNOW. AND HE WAS  
2 HIRED TO IMPROVE AND PERFECT THE TITAN SCRAPER. THE FIRST CLIP  
3 YOU'LL HEAR IS HIM TALKING ABOUT HIS JOB INTERVIEW AT  
4 TOMORROWNOW WITH GREG NELSON, WHO'S THE BROTHER OF THE FOUNDER  
5 ANDREW NELSON.

6 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

7 "Q. IN THE COURSE OF THOSE INTERVIEWS,  
8 DID -- WELL, LET'S START WITH GREG NELSON -- DID  
9 GREG NELSON GIVE YOU A DESCRIPTION OF WHAT YOUR  
10 JOB RESPONSIBILITIES WOULD BE AT TOMORROWNOW?

11 "A. THEY WERE LOOKING FOR A SPECIALIZED --  
12 AN AUTOMATION DEVELOPMENT FOR DOT NET, AND THEY  
13 SAID THEY HAD CURRENTLY TWO PROJECTS THAT WERE  
14 VERY GOOD TO GO AND THEY NEEDED SOMEONE ON BOARD  
15 FAST TO GET THEM GOING. ONE WAS TITAN. THE  
16 OTHER WAS -- OH, GOD, I DIDN'T WORK ON IT, SO I  
17 CAN'T REMEMBER WHAT THE HECK IT WAS. IT WAS  
18 ANOTHER APPLICATION. BUT THEY MENTIONED TWO  
19 SPECIFIC APPLICATIONS, TITAN BEING ONE OF THEM.  
20 THEY DESCRIBED TITAN AS A DOWNLOADER.

21 "THEY WENT AND RETRIEVED CERTAIN DOCUMENTS OFF  
22 THE WEB, AND THEY NEEDED SOMEONE TO CONTINUE WORKING  
23 ON THAT PROGRAM.

24 "Q. THIS DISCUSSION THAT YOU HAD WITH  
25 MR. NELSON IN WHICH HE ASKED YOU NOT TO PUT

1 THINGS IN WRITING, WAS THAT RELATED SPECIFICALLY  
2 TO THE WORK THAT YOU WOULD BE DOING FOR TITAN?

3 "A. HE SAID JUST ABOUT ANYTHING JUST.

4 "Q. JUST DON'T PUT THINGS IN WRITING?

5 "A. DON'T PUT ISSUES IN WRITING.

6 "Q. DID HE SAY THAT THAT WAS A COMPANY  
7 POLICY?

8 "A. YES."

9 **MR. HOWARD:** THE NEXT CLIP YOU'LL HEAR --

10 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

11 "Q. IN THE TIME THAT YOU WORKED AT  
12 TOMORROWNOW, DID YOU OBSERVE THAT THAT WAS A  
13 COMPANY POLICY THAT WAS ENFORCED?

14 "A. YES.

15 "Q. WAS IT ENFORCED BY MR. NELSON?

16 "A. YES."

17 **MR. HOWARD:** THE NEXT CLIP THAT YOU'LL HEAR IS AFTER  
18 MR. RITCHIE HAS BEGUN WORK ON TITAN AND SOME CONCERNS THAT HE  
19 DEVELOPED ABOUT TITAN.

20 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

21 "Q. WAS THERE A SPECIFIC TOPIC IN --  
22 RELATED TO WHICH MR. DELAINE CONVEYED TO YOU  
23 MR. NELSON'S INSTRUCTIONS TO NOT SAY ANYTHING  
24 MORE ABOUT SOMETHING?

25 "A. YES. IT WAS IN REGARDS TO -- TITAN WAS

1           DOWNLOADING. WHAT WE WERE DOING WAS THEY WERE  
2           HAVING THE CODE FOR THE PROGRAM THEY --

3           "Q. WHAT WAS IT THAT YOU HAD SAID ABOUT  
4           TITAN'S DOWNLOADING THAT LED TO THIS DISCUSSION  
5           WITH MR. DELAINE?

6           "A. I HAD CONCERNS ABOUT THE COPYRIGHT AND  
7           INTELLECTUAL PROPERTY NOTICES THAT WERE ON THE  
8           WEBSITE REGARDING EACH OF THE ARTIFACTS.

9           "Q. AND HOW DID YOU DEVELOP THE CONCERNS  
10          THAT YOU HAD?

11          "A. I READ THEM.

12          "Q. WHAT DID YOU READ?

13          "A. I READ THINGS LIKE 'INTELLECTUAL  
14          PROPERTY OF ORACLE CORPORATION, NO WAY, NO HOW  
15          SHOULD THIS BE COPIED OR HANDED FORTH' AND IT  
16          GAVE A SPECIFIC EXAMPLE. I REMEMBER THAT IF  
17          EMPLOYEE A OF A COMPANY DOWNLOADS A DOCUMENT, HE  
18          CAN'T EVEN GIVE IT TO EMPLOYEE B. EMPLOYEE B  
19          NEEDS TO DOWNLOAD HIS OWN COPY. AND WE WERE A  
20          THIRD-PARTY INTEREST WORKING FOR THE ONES THAT  
21          HAVE THE ORIGINAL CONTRACT AND DOWNLOADING THAT  
22          SEEMED TO BE A CONFLICT WITH EVERYTHING I READ."

23          **MR. HOWARD:** ALL RIGHT. SO WE'RE LOOKING AT THE  
24          SCOPE, THE SCOPE OF WHAT THE LICENSE WOULD HAVE HAD TO HAVE  
25          BEEN. AND MR. RITCHIE'S GOING TO TELL YOU NOW ABOUT THE IMPACT



1 THAT TITAN HAD AS HE WAS TRYING TO MAKE IT DOWNLOAD MORE AND  
2 MORE.

3 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

4 "Q. IN ADDITION, OTHER THAN THE TERMS OF  
5 USE IN THE VARIOUS COPYRIGHT NOTICES THAT YOU  
6 SAW, WAS -- WERE THERE ANY -- WAS THERE ANYTHING  
7 ELSE THAT YOU ENCOUNTERED IN THE COURSE OF  
8 DEVELOPING TITAN OR DOWNLOADING FROM THE ORACLE  
9 WEBSITE THAT WAS A BASIS FOR THE CONCERNS YOU'VE  
10 DESCRIBED?

11 "A. YES. THE OTHER CONCERN THAT I  
12 MENTIONED WAS THAT SINCE TITAN WAS HAMMERING  
13 THEIR SERVER SO HARD, DOWNLOADING THOUSANDS AND  
14 THOUSANDS OF DOCUMENTS, I COULD SEE HOW MANY  
15 TIMES THAT SERVERS WOULD CRASH BY HOW MANY TIMES  
16 MY PROGRAM HAD TO BREAK THE CONNECTION AND THEN  
17 REESTABLISH IT, RENAVIGATE BACK TO WHERE IT WAS  
18 AND PICK UP WHERE IT LEFT OFF.

19 "AND SO, YOU KNOW, IF YOU WANT TO REALLY  
20 LOOK AT IT THAT WAY, THIS, IN MY MIND, WAS  
21 EQUIVALENT TO WHAT WE CALL A DENIAL OF SERVICE  
22 ATTACK, YOU KNOW, WHERE YOU BASICALLY POUND ON A  
23 SERVER SO HARD THAT NOBODY CAN GET THROUGH TO  
24 IT."

25 **MR. HOWARD:** ALL RIGHT. LAST CLIP THAT I'LL SHOW YOU

1 FROM MR. RITCHIE. YOU'RE GOING TO BE HEARING MORE OF  
2 MR. RITCHIE'S TESTIMONY AS WE GO THROUGH THE WEEK.

3 THE LAST CLIP THAT I'LL SHOW YOU NOW IS HIM TALKING  
4 TO HIS SUPERVISOR TALKING TO THE MANAGEMENT ABOUT -- ABOUT WHAT  
5 HE'S SAYING.

6 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

7 "Q. AND WERE THE -- THE DISCUSSIONS THAT  
8 YOU HAD WITH MR. DELAINE REGARDING TITAN'S  
9 IMPACT UPON THE PERFORMANCE OF ORACLE WEBSITE,  
10 WERE THOSE PART OF THE SAME DISCUSSIONS YOU WERE  
11 HAVING REGARDING YOUR CONCERNS ABOUT THE  
12 LEGALITY OF TITAN OVERALL?

13 "A. YES AND NO. SOMETIMES I BROUGHT IT  
14 UP -- I NOTICE I HIT DENIAL OF SERVICE STUFF  
15 REALLY HEAVY, AND I BROUGHT IT UP TO MARK  
16 DELAINE COUPLE OF TIMES AND JULIO SEPARATELY OF  
17 THE COPYRIGHT NOTICES. I SAID THIS IS ANOTHER  
18 PROBLEM THAT WE'RE CAUSING.

19 "Q. AND IN THE -- WHEN YOU BROUGHT IT UP  
20 SEPARATELY -- WHEN YOU HAD THESE SEPARATE  
21 DISCUSSIONS WITH MR. DELAINE, WHAT WAS HIS  
22 RESPONSE?

23 "A. HIS RESPONSE WAS PRETTY MUCH THE SAME  
24 AS ALWAYS. YOU KNOW, WE NEED TO DO IT, AND IF  
25 ANYTHING HAPPENS, YOU KNOW, COVER YOUR BACK.

1 WELL, ACTUALLY, I THINK HIS ACTUAL WORDS WERE I  
2 GUESS I'LL BE IN JAIL NEXT TO YOU.

3 "Q. THAT'S WHAT HE SAID TO YOU?

4 "A. YEAH."

5 **MR. HOWARD:** ALL RIGHT. LAST POINT ON SCOPE.

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 **MR. HOWARD:** FOR TOMORROWNOW'S ACTIVITY WHEN --  
8 EVIDENCE WILL SHOW THAT WHEN SAP BOUGHT TOMORROWNOW, DIDN'T TELL  
9 IT TO STOP, WHAT IT SAID WAS IN THE WORDS OF ANDREW NELSON --  
10 AGAIN, THE FOUNDER OF TOMORROWNOW. HE'S REPORTING A  
11 CONVERSATION HE HAD WITH GERD OSWALD. YOU SAW HIS PICTURE ON  
12 THE SLIDE THAT I SHOWED OF THE SAP AG EXECUTIVE BOARD.

13 "Q. WHAT DID YOU UNDERSTAND WOULD BE THE  
14 WAYS IN WHICH YOUR PERFORMANCE WOULD BE MEASURED  
15 AS A NEW SAP COMPANY?

16 "BELIEVE MY FIRST MEETING WITH GERD OSWALD AFTER  
17 THE ACQUISITION, HE TOLD ME TO CLOSE THE FIRST  
18 CUSTOMER OR THE FIRST COUPLE OF CUSTOMERS IN AS MANY  
19 PLACES AS POSSIBLE IN AS MANY NEW MARKETS AS  
20 POSSIBLE."

21 AND THAT'S WHAT THEY DID. WENT INTO EUROPE -- CAME  
22 OUT OF TEXAS, OUT OF THE UNITED STATES, WENT INTO EUROPE,  
23 AUSTRALIA, SINGAPORE. THEY EXPANDED AS FAST AS THEY COULD.

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 **MR. HOWARD:** NOW, LET'S SHIFT OUT OF THE SCOPE, AND,

1 AGAIN, WE'RE THINKING ABOUT THE EVIDENCE THAT WOULD APPLY TO  
2 THESE DIFFERENT FACTORS AND THINKING ABOUT WHAT THE VALUE -- THE  
3 FAIR MARKET VALUE WOULD BE OF THAT LICENSE IN JANUARY OF 2005.

4 AND THIS IS A KIND OF A PREVIEW OF THE EVIDENCE THAT  
5 WILL COME. BUT I PUT IT IN THE FORM OF A TIME THAT WE CAN  
6 REMEMBER IT AS WE GO THROUGH. SEPTEMBER OF 2004, ORACLE WON AN  
7 ANTITRUST LAWSUIT FOR THE RIGHT TO ACQUIRE PEOPLESOFT. BY  
8 DECEMBER 12TH OF 2004, ORACLE AND PEOPLESOFT HAD SIGNED THEIR  
9 DEFINITIVE MERGER AGREEMENT.

10 THAT WAS THE FIRST DAY THAT THE WORLD KNEW THAT THIS  
11 DEAL WAS GOING TO HAPPEN. THE VERY NEXT DAY, VERY NEXT DAY, SAP  
12 STARTED THINKING ABOUT BUYING TOMORROWNOW TO DISRUPT AND  
13 DISCREDIT ORACLE.

14 EVIDENCE WILL SHOW THAT A WEEK LATER, SAP  
15 VICE-PRESIDENT JOHN ZEPECKI -- JOHN ZEPECKI, YOU SAW HIS  
16 PICTURE, AND I COMMENTED ON IT WHEN I PUT THE SLIDE UP -- JOHN  
17 ZEPECKI HAD JUST COME OVER FROM PEOPLESOFT. HE HAD BEEN A  
18 VICE-PRESIDENT AT PEOPLESOFT, A DEVELOPER VICE-PRESIDENT. SO  
19 NOBODY KNEW THE CODE, NOBODY KNEW THE SOFTWARE, NOBODY KNEW THE  
20 RIGHTS BETTER THAN MR. ZEPECKI. SO THEY BRING HIM IN TO HELP  
21 THEM CONSIDER -- HELP THE SAP BOARD CONSIDER THE PURCHASE OF  
22 TOMORROWNOW.

23 AND HE WRITES TO THE BOARD -- TO MR. AGASSI, HE  
24 WRITES, VERY LIKELY THAT TOMORROWNOW IS USING THE PEOPLESOFT  
25 SOFTWARE OUTSIDE THE CONTRACTUAL USE RIGHTS GRANTED TO THEM.

1 JANUARY 7TH, 3 WEEKS LATER, ORACLE FINALLY CLOSES ON  
2 PEOPLESFT. THE VERY SAME DAY, THERE'S A BUSINESS CASE  
3 PRESENTED TO THE BOARD. AND MR. ZEPECKI'S WORDS ARE IN THE  
4 BUSINESS CASE. AND THE BOARD IS TOLD THAT THERE'S A SERIOUS  
5 LIABILITY BECAUSE OF TOMORROWNOW'S COPIES AND THE WAY IT CREATES  
6 ITS FIXES.

7 WELL, A LITTLE BIT LESS THAN A WEEK LATER, THE BOARD  
8 APPROVES THE ACQUISITION OF TOMORROWNOW BECAUSE THE EVIDENCE  
9 WILL SHOW THERE WAS AN URGENT NEED. AND THERE WAS AN URGENT  
10 NEED FOR SOMETHING THAT ONLY TOMORROWNOW COULD PROVIDE. AND  
11 THAT WAS THE ACCESS TO THE CUSTOMERS AND THE SOFTWARE SO THAT BY  
12 THE END OF JANUARY WHEN ORACLE ANNOUNCED PUBLICLY ITS PLANS FOR  
13 INTEGRATING PEOPLESFT ON JANUARY 18TH, THAT BY JANUARY 19TH,  
14 ACCORDING TO ITS PLAN, SAP COULD ANNOUNCE THE ACQUISITION OF  
15 TOMORROWNOW.

16 AND THAT IS WHEN WE LOOK AT WHAT THE FAIR MARKET  
17 VALUE WAS HAD THEY GONE TO THE TABLE, HAD THEY LOOKED IN THE  
18 EYE, HAD THEY NEGOTIATED THE LICENSE. WHAT WAS IT WORTH TO BOTH  
19 PARTIES AT THAT TIME?

20 SO LET'S GO THROUGH --

21 (DEMONSTRATIVE PUBLISHED TO JURY.)

22 **MR. HOWARD:** LET'S TALK FIRST ABOUT SAP'S NEED FOR  
23 THE SOFTWARE AND HOW THAT RELATES TO THE VALUE OF THAT LICENSE  
24 AT THAT TIME.

25 (DEMONSTRATIVE PUBLISHED TO JURY.)

1                   **MR. HOWARD:** ON DECEMBER 17TH, JUST A FEW DAYS AFTER  
2 THE BOARD IS -- HAS DECIDED TO PURSUE THE ACQUISITION, GENTLEMAN  
3 NAMED ARLEN SHENKMAN. HE WAS AN EXECUTIVE AT SAP. HE WRITES TO  
4 MR. AGASSI, HE WRITES TO MR. BRANDT, WHO'S SITTING OVER HERE AT  
5 THE TABLE, AND HE SAYS, CURRENT -- OUR RESEARCH HAS NOT PROVIDED  
6 US WITH ANY -- ANY MEANINGFUL COMPETITORS FOR TOMORROWNOW IN  
7 THIS SPACE.

8                   AND ONE OF THE TOP-RATED ANALYSTS IN THE INDUSTRY,  
9 GARDINER, SAYS THAT'S WHO THEY -- THE ONLY VENDOR THEY RECOMMEND  
10 IS TOMORROWNOW. TOMORROWNOW WAS THE ONLY GAME IN TOWN. IF THEY  
11 WERE GOING TO DO THIS, THEY HAD TO GO WITH TOMORROWNOW. SO THE  
12 NEED FOR TOMORROWNOW WAS VERY HIGH. IT'S A FACTOR THAT WE  
13 CONSIDER IN THINKING ABOUT THE FAIR MARKET VALUE AT THIS TIME IN  
14 JANUARY.

15                   (DEMONSTRATIVE PUBLISHED TO JURY.)

16                   **MR. HOWARD:** DECEMBER 13TH, MR. AGASSI WRITES TO  
17 MR. BRANDT AND OTHERS. MR. BRANDT IS A C.F.O. OF SAP AG, AND  
18 YOU'LL HEAR HIS TESTIMONY LATER IN THE TRIAL. AND HE --  
19 MR. AGASSI STARTING NOW TO TALK ABOUT THE GOALS. WHAT ARE OUR  
20 GOALS? WHAT IS THE FINANCIAL BENEFIT? WHAT IS THE FINANCIAL  
21 IMPACT THAT WE COULD HAVE? HE SAYS IN CONTINUATION TO THE  
22 PEOPLESOFT/ORACLE SAGA, WE DECIDED TO TAKE A STRONG LOOK AT  
23 OFFERING PEOPLESOFT SUPPORT FROM SAP STARTING IN EARLY 2005.

24                   THE IDEA, HE SAYS -- THE IDEA IS TO TAKE AWAY THE  
25 MAINTENANCE REVENUE STREAM FROM ORACLE.

(DEMONSTRATIVE PUBLISHED TO JURY.)

**MR. HOWARD:** DECEMBER 15TH, THE MINUTES OF THE SAP AG EXECUTIVE BOARD. THE BOARD AGREES -- THE BOARD AGREES TO MAKE A SPECIAL OFFER TO PEOPLESOFT CUSTOMERS TO TAKE OVER RESPONSIBILITY FOR MAINTENANCE OF THEIR PEOPLESOFT SOFTWARE AND -- AND THIS IS IMPORTANT -- POTENTIALLY UPGRADE TO SAP.

(DEMONSTRATIVE PUBLISHED TO JURY.)

**MR. HOWARD:** NOW, THE RISK OF BEING CAUGHT, THE RISK OF SITTING HERE HAVING TO HAVE ADMITTED COPYRIGHT INFRINGEMENT DOES SHOW THAT THIS WAS VERY VALUABLE AT THE TIME.

(DEMONSTRATIVE PUBLISHED TO JURY.)

**MR. HOWARD:** LET'S LOOK AT SOME OF THE EVIDENCE. THIS IS THE DECEMBER 21ST EMAIL FROM MR. ZEPECKI TO MR. AGASSI THAT I READ TO YOU FROM THE TIMELINE JUST A MINUTE AGO WHERE HE SAYS IT'S VERY LIKELY THAT TOMORROWNOW IS ACTING OUTSIDE THE CONTRACTUAL USE RIGHTS.

(DEMONSTRATIVE PUBLISHED TO JURY.)

**MR. HOWARD:** THIS IS THE BUSINESS CASE THAT'S PRESENTED TO THE BOARD OF DIRECTORS ON JANUARY 7TH.

(DEMONSTRATIVE PUBLISHED TO JURY.)

**MR. HOWARD:** THE BOARD SEES IN THE BUSINESS CASE -- AND, AGAIN, MR. AGASSI ALREADY KNEW THIS, OTHER BOARD MEMBERS KNEW THIS. BUT THEY ALL SEE THERE'S A THREAT, THERE'S A RISK. THE ACCESS RIGHTS TO THE PEOPLESOFT SOFTWARE IS VERY LIKELY TO BE CHALLENGED BY ORACLE. AND PAST OPERATING ISSUES MAY BE A

1 SERIOUS LIABILITY.

2 IT REFERS TO THE COPIES, THE OFFSITE COPIES THAT  
3 TOMORROWNOW HAS IN THE FORM OF REGULATORY UPDATES. AGAIN,  
4 ALMOST WORD FOR WORD WHAT MR. ZEPECKI, THE FORMER PEOPLESOF  
5 VICE-PRESIDENT OF DEVELOPMENT, HAS SAID TO THEM IN THE TWO OR  
6 THREE WEEKS THAT THEY HAVE BEEN STUDYING THIS TRANSACTION AND  
7 REALIZING THIS IS THE ONLY WAY FOR THEM TO TAKE A SHOT AT THESE  
8 CUSTOMERS AND DISRUPT ORACLE'S ACQUISITION OF PEOPLESOF.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 **MR. HOWARD:** ON THE SAME SLIDE, THERE'S A RISK  
11 THEY'VE IDENTIFIED IT. IT'S A KNOWN RISK. IT'S RIGHT THERE IN  
12 FRONT OF THEM IN THEIR OWN WORDS ON THE PAGE. BUT THEY DECIDE  
13 TO TAKE THE RISK BECAUSE OF THE OPPORTUNITY. THE OPPORTUNITY IS  
14 THAT ORACLE'S DEAL ASSUMPTIONS WILL BE CHALLENGED. THEY'LL  
15 HAVE -- THEY'LL LOSE SUPPORT REVENUE. IT WILL FORCE ACTIONS.  
16 IT WILL FORCE REACTIONS. IT WILL BE A DISTRACTION. AND THEY  
17 DECIDED THAT THAT WAS WORTH IT.

18 (DEMONSTRATIVE PUBLISHED TO JURY.)

19 **MR. HOWARD:** IT WAS SO WORTH IT AND THE EVIDENCE WILL  
20 SHOW THAT THE RISK WAS SO HIGH THAT THEY TOOK SOME STEPS TO  
21 PROTECT THEMSELVES. THEY TOOK SOME STEPS TO INSULATE THEMSELVES  
22 FROM THE LIABILITY FOR COPYRIGHT INFRINGEMENT THAT THEY HAD  
23 IDENTIFIED AS A THREAT A FEW PAGES EARLIER IN THIS BUSINESS CASE  
24 THAT THE BOARD OF DIRECTORS SOUGHT.

25 IN THIS SLIDE FROM THE SAME -- SAME PRESENTATION,



1 THEY DECIDE THAT THE WAY THAT THEY WILL INSULATE THEMSELVES FROM  
2 THE RISK IS THAT THEY WILL LEAVE THE TEXAS CORPORATION,  
3 TOMORROWNOW, IN EXISTENCE AS A LIABILITY SHIELD FOR ANY  
4 POTENTIAL CLAIMS.

5 NOW, THE SHIELD DIDN'T WORK, ADMITTED TO THE  
6 LIABILITY, BUT WHAT THIS TELLS US IS THE ENORMOUS VALUE THAT  
7 TOMORROWNOW HAD, THAT THE ACCESS TO THE COPYRIGHTED SOFTWARE HAD  
8 BECAUSE IF IT WASN'T SO VALUABLE, YOU WOULDN'T BE GOING TO THESE  
9 LENGTHS TO INSULATE YOURSELF FROM IT.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 **MR. HOWARD:** LET ME SHOW YOU WHAT MR. BRANDT SAID  
12 ABOUT THIS PAGE IN THE BUSINESS CASE OF JANUARY 7TH, 2005.

13 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

14 "Q. IN THE SECOND BOX IN BOTH OF THESE  
15 DOCUMENTS READS SAP WILL LEAVE THE TEXAS  
16 CORPORATION IN EXISTENCE AS A LIABILITY SHIELD  
17 FOR ANY POTENTIAL CLAIMS. DO YOU SEE THAT?

18 "A. OKAY. I SEE THAT.

19 "Q. AND WHOSE IDEA WAS THAT?

20 "A. (THROUGH THE INTERPRETER) I CAN'T NAIL  
21 THAT DOWN TO ONE PERSON, BUT THAT WAS THE IDEA.

22 "Q. YOU WERE INVOLVED IN THAT DECISION?

23 "A. (THROUGH THE INTERPRETER) THE ENTIRE  
24 BOARD OF SAP AG WAS INVOLVED IN THAT DECISION.

25 "Q. JUST SO THE COURT AND THE JURY

1 UNDERSTAND, SAP'S EXPOSURE TO ORACLE LAWSUIT  
2 BASED ON TOMORROWNOW'S SERVICE DELIVERY  
3 PRACTICES WERE CONSIDERED IN DECIDING HOW TO  
4 STRUCTURE THE COMPANY ON A GOING-FORWARD BASIS,  
5 CORRECT?

6 "A. (THROUGH THE INTERPRETER) IT WAS  
7 SOMETHING THAT WAS TAKEN ACCOUNT -- INTO ACCOUNT  
8 WHEN THE STRUCTURE WAS ESTABLISHED, THE  
9 GERMAN --"

10 **MR. HOWARD:** SO THERE WAS A NEED, AND THERE WAS A  
11 RISK THAT WAS TAKEN. THE OTHER BOARD MEMBERS AGREE WITH  
12 MR. BRANDT.

13 (DEMONSTRATIVE PUBLISHED TO JURY.)

14 **MR. HOWARD:** MR. OSWALD: "WE LOOKED AT THOSE RISKS  
15 AND DECIDED TO ACQUIRE."

16 MR. AGASSI: "SAP ACQUIRED TN WITH THE KNOWLEDGE THAT  
17 THERE WAS A RISK THAT ORACLE WOULD SUE."

18 AND THE C.E.O. AT THE TIME, NO LONGER WITH THE  
19 COMPANY -- BUT THE C.E.O. AT THE TIME OF SAP AG, HENNING  
20 KAGERMANN. LET'S HEAR WHAT HE SAYS.

21 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

22 "Q. IS IT FAIR TO SAY THAT THE RISK OF --  
23 BY ORACLE TO TOMORROWNOW'S ACCESS RIGHTS OF  
24 PEOPLESFT SOFTWARE WAS NEVERTHELESS A RISK THAT  
25 SAP KNOWINGLY UNDERTOOK WHEN IT DECIDED TO BUY

1 TOMORROWNOW?

2 "A. (THROUGH THE INTERPRETER) YES, IT WAS A  
3 RISK.

4 "Q. THAT RISK INCLUDED THE RISK OF  
5 CHALLENGE TO THE OFFSITE PRODUCTION COPIES?

6 "A. (THROUGH THE INTERPRETER) I NO LONGER  
7 RECALL THAT.

8 "Q. WAS IT A RISK THAT ALSO INCLUDED A  
9 CHALLENGE TO THE FORM OF DELIVERY OF REGULATORY  
10 UPDATES?

11 "A. (THROUGH THE INTERPRETER) IT'S  
12 POSSIBLE."

13 **MR. HOWARD:** SO LET'S NOW TURN AWAY FROM THE RISK  
14 THAT WAS KNOWINGLY TAKEN AS AN INDICATOR OF VALUE IN JANUARY OF  
15 2005, AND LET'S LOOK AT MORE OF THE FINANCIAL BENEFIT THAT SAP  
16 EXPECTED TO GET AND SOME OF THE IMPACT EXPECTED TO HAVE ON ITS  
17 NEWLY EMERGED COMPETITOR, ORACLE, WHICH HAS NOW ACQUIRED  
18 PEOPLESOFT TO RISE UP AND CHALLENGE SAP -- START TO CHALLENGE  
19 SAP IN THIS INCREDIBLY VALUABLE MARKET FOR ENTERPRISE  
20 APPLICATION SOFTWARE.

21 (DEMONSTRATIVE PUBLISHED TO JURY.)

22 **MR. HOWARD:** MR. AGASSI WRITES ON JANUARY 6TH, 2005,  
23 HE SAYS, THE PRESS RELEASE ON THIS DEAL WILL BE THE CHEAPEST  
24 ADVERTISING WE EVER GOT, AND ORACLE'S SHARE PRICE WILL PROBABLY  
25 GO DOWN BY 10 PERCENT THAT SAME MINUTE.

1 WELL, EVIDENCE WILL SHOW THAT ORACLE'S SHARE PRICE  
2 WAS WORTH ABOUT \$70 BILLION AT THAT MOMENT AT THAT TIME. SO A  
3 10 PERCENT DROP IN ORACLE'S SHARE PRICE IS ABOUT \$7 BILLION.  
4 THAT'S THE IMPACT THAT SAP WAS HOPING TO GET THROUGH ITS KNOWING  
5 ACQUISITION OF TOMORROWNOW IN JANUARY OF 2005, WHEN WE VALUE  
6 WHAT THAT LICENSE IS FOR THAT COPYRIGHTED SOFTWARE.

7 NOW, LET'S JUST PAUSE FOR A MOMENT, AND I WANT TO  
8 LOOK AT --

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 **MR. HOWARD:** -- WHAT SAP MAY COME UP AND TELL YOU,  
11 BECAUSE THERE ARE TWO THEORIES OF WHAT THE RIGHT MEASURE OF  
12 DAMAGES ARE IN THIS CASE THAT PROBABLY WON'T COME AS A GREAT  
13 SURPRISE TO YOU.

14 (DEMONSTRATIVE PUBLISHED TO JURY.)

15 **MR. HOWARD:** SAP DOESN'T WANT TO PAY THE FAIR MARKET  
16 VALUE AS IT WAS AT THE TIME WHEN IT DID NOT CHOOSE TO NEGOTIATE.  
17 SAP HAS SAID THAT IT EXPECTED TO HARM ORACLE AS MUCH AS IT  
18 EXPECTED -- IT FAILED TO HARM ORACLE AS MUCH AS IT EXPECTED, SO  
19 THE DAMAGES SHOULD ONLY BE MEASURED BY ORACLE'S LOST PROFITS.

20 IF YOU HEAR THAT, IF YOU HEAR THAT ARGUMENT, ASK  
21 YOURSELF, DOES WHAT SAP FAILED TO DO HAVE ANYTHING TO DO WITH  
22 THE VALUE OF THE SOFTWARE? NO, IT -- THE EVIDENCE WILL SHOW  
23 THAT THAT HAS NOTHING TO DO WITH THE VALUE OF THE SOFTWARE.

24 ASK YOURSELF WHAT DID SAP SAY AT THE TIME IN ITS OWN  
25 DOCUMENTS ABOUT THE VALUE THAT IT PUT ON TOMORROWNOW? I'VE

1 SHOWN YOU SOME OF THOSE DOCUMENTS. IT VALUED THIS SOFTWARE --  
2 IT VALUED THIS COMPANY IN WAYS UNRELATED TO WHAT IT MAY TELL YOU  
3 NOW IS THE RIGHT WAY TO VALUE IT.

4 DO ORACLE'S LOST PROFITS REPRESENT FULL VALUE? SURE,  
5 THERE ARE SOME LOST PROFITS. ARE THEY THE FULL VALUE OF THE  
6 SOFTWARE AT THE TIME GIVEN THE FACTORS THAT WE'VE LOOKED AT?

7 AND I THINK THE DOCUMENTS -- IF YOU READ THE  
8 DOCUMENTS THAT ARE WRITTEN AT THE TIME, THE EVIDENCE WILL SHOW  
9 THAT, NO, THE LOST PROFITS NOW HAVE NOTHING TO DO WITH WHAT WAS  
10 WRITTEN AT THE TIME AS THE EXPECTED VALUE.

11 AND FINALLY, DOES ORACLE RECEIVE THE FULL VALUE OF  
12 ITS COPYRIGHTED SOFTWARE IF IT DOESN'T EVER HAVE THE CHANCE TO  
13 SIT AT THE TABLE, TO LOOK SOMEBODY IN THE EYE, AND TO NEGOTIATE  
14 A LICENSE THE WAY COMPETITORS DO WHEN THEY COMPETE FAIRLY.

15 (DEMONSTRATIVE PUBLISHED TO JURY.)

16 **MR. HOWARD:** YOU MAY HEAR THAT ORACLE EXECUTIVES DID  
17 NOT EXPECT TOMORROWNOW TO BE -- HAVE A SIGNIFICANT IMPACT ON  
18 ORACLE. YOU MAY HEAR THAT. IF YOU HEAR THAT, ASK YOURSELF DID  
19 THE ORACLE EMPLOYEES WHO WROTE THOSE DOCUMENTS KNOW -- DID THEY  
20 KNOW THAT TOMORROWNOW HAD OVER 7,000 ILLEGAL COPIES OF THEIR  
21 SOFTWARE SITTING IN A LIBRARY TO USE TO GO OUT AND COMPETE FOR  
22 THEIR CUSTOMERS? DID THEY KNOW THAT TITAN HAD BEEN DEVELOPED AS  
23 A SCRAPER TO GO INTO ORACLE'S WEBSITE? DID THEY KNOW THAT WHEN  
24 THEY WROTE THOSE DOCUMENTS?

25 NO. NO, THEY DIDN'T KNOW THAT UNTIL WE BROUGHT THIS

1 LAWSUIT.

2 IF ORACLE HAD KNOWN THAT SAP AND TOMORROWNOW WOULD BE  
3 ABLE TO USE PEOPLESOFT AND JD EDWARDS COPYRIGHTED SOFTWARE TO  
4 COMPETE WITH ORACLE, HOW MUCH WOULD ORACLE HAVE EXPECTED SAP TO  
5 PAY? HOW MUCH WOULD ORACLE HAVE EXPECTED SAP TO PAY AFTER  
6 ORACLE ITSELF HAD JUST SPENT \$11 BILLION TO GET THE NEARLY  
7 10,000 CUSTOMERS TO COMPETE WITH SAP?

8 FIRST OF ALL, WOULD IT HAVE PAID THE \$11 BILLION?  
9 BUT WHAT WOULD IT HAVE EXPECTED TO GET RIGHT AFTER IT PAID THE  
10 \$11 BILLION IF IT KNEW THAT THE COMPANY THAT WAS STILL MORE THAN  
11 DOUBLE ITS SIZE WAS NOW GOING TO TAKE HALF OF THOSE CUSTOMERS TO  
12 GO OUT AND COMPETE WITH IT USING ITS OWN INTELLECTUAL PROPERTY?  
13 HOW MUCH WOULD IT HAVE CHARGED?

14 (DEMONSTRATIVE PUBLISHED TO JURY.)

15 **MR. HOWARD:** YOU MAY ALSO HEAR THAT TOMORROWNOW  
16 DIDN'T MAKE ANY MONEY AND THAT IT ONLY COST \$10 MILLION. THAT'S  
17 WHAT SAP PAID FOR TOMORROWNOW. WHEN YOU HEAR THAT, ASK YOURSELF  
18 HOW DID SAP VALUE TOMORROWNOW? DID IT VALUE IT AS A \$10 MILLION  
19 ACQUISITION, OR DID IT VALUE FOR ITS EXPECTED \$7 BILLION IMPACT  
20 ON ORACLE AND FOR ITS ABILITY TO TAKE HALF OF THOSE 10,000  
21 CUSTOMERS?

22 DID SAP MEASURE THE VALUE OF TOMORROWNOW'S BUSINESS  
23 BY ITS COST OR BY THESE OTHER BENEFITS THAT IT EXPECTED, THE  
24 ABILITY TO TAKE THOSE CUSTOMERS, SELL THEM SAP SOFTWARE, THE  
25 ABILITY TO DISRUPT ORACLE IN THE MARKET, THE ABILITY TO PREVENT

1 ORACLE FROM DEVELOPING THE NEXT GREATEST TECHNOLOGY?

2 AND DID SAP PLAN TO USE TOMORROWNOW AS A LOSS LEADER?

3 SO IF YOU HEAR THAT TOMORROWNOW NEVER MADE ANY MONEY, THE

4 EVIDENCE WILL SHOW THAT TOMORROWNOW WAS NEVER INTENDED TO MAKE

5 ANY MONEY. THE POINT OF TOMORROWNOW WASN'T TO MAKE MONEY,

6 BECAUSE TOMORROWNOW SOLD ITS SERVICES FOR 50 PERCENT OR FREE

7 SOMETIMES. IT WAS A LOSS LEADER, BECAUSE THE POINT OF IT WAS TO

8 GET THE CUSTOMER AWAY FROM ORACLE, SELL THEM SAP, IMPACT ORACLE,

9 HARM ORACLE.

10 POINT OF TOMORROWNOW, EVIDENCE WILL SHOW, WAS NEVER

11 ABOUT WHAT MONEY IT MADE.

12 NOW, LET'S LOOK AT THE DOCUMENTS AGAIN AT THE TIME

13 THAT SHOW WHAT THAT EXPECTED FINANCIAL BENEFIT WAS.

14 (DEMONSTRATIVE PUBLISHED TO JURY.)

15 **MR. HOWARD:** WHAT THE BOARD AND THE EXECUTIVES OF SAP

16 EXPECTED.

17 GOAL. GOAL. OUR GOAL IS TO CONVERT THE MAJORITY OF

18 THE PEOPLESOFT AND JD EDWARDS CUSTOMER BASE TO SAP AND CONTAIN

19 ORACLE'S POTENTIAL GROWTH IN THE NEXT GENERATION APPLICATION

20 MARKET. JANUARY 16, 2005.

21 STRATEGY. BY OFFERING FULL MAINTENANCE AND SUPPORT

22 TO THESE PEOPLESOFT SYSTEMS, MIGRATION TOOLS, UPGRADE THEM TO

23 SAP, WHAT DID THEY GET? SAP WILL SIPHON OFF THE CASH FLOW THAT

24 ORACLE NEEDS TO BUILD OR ACQUIRE ITS NEXT GENERATION

25 APPLICATION.

1           THAT'S THE VALUE, IN THEIR WORDS, AT THE TIME THAT  
2           THEY PUT ON TOMORROWNOW. THAT'S HOW THEY WERE THINKING. THE  
3           SAP BOARD, THE SAP EXECUTIVES, THAT'S HOW THEY WERE THINKING  
4           ABOUT HOW VALUABLE THIS WAS AT THE TIME.

5                           (DEMONSTRATIVE PUBLISHED TO JURY.)

6           **MR. HOWARD:** NOW, SOME OF THESE DOCUMENTS ARE HIGHLY  
7           CONFIDENTIAL DOCUMENTS. SOME OF THEM ARE NOT. SOME OF THIS WAS  
8           JUST PUBLICLY STATED BECAUSE THE POINT OF IT WAS TO PUBLICIZE --  
9           NOT THAT THEY WERE KNOWINGLY INFRINGING THE SOFTWARE BUT THAT  
10          THEY HAD TOMORROWNOW IN PLACE SO THAT ALL THE CUSTOMERS WOULD  
11          KNOW. AND THAT WAS WHY IT WAS SO URGENT TO DO THIS DEAL IN THE  
12          BARELY 30 DAYS THAT IT TOOK TO DO IT FROM THE TIME THAT THEY  
13          FIRST IDENTIFIED TOMORROWNOW AS THE FIRST -- AS THE ONLY  
14          AVAILABLE OPTION, TO JANUARY 19TH, 2005, BECAUSE THEY HAD TO --  
15          THEY WANTED TO, EVIDENCE WILL SHOW, DISRUPT ORACLE'S ACQUISITION  
16          OF PEOPLESOFT IN JANUARY, DON'T LET THEM GET THE MOMENTUM. AND  
17          THE NEXT DAY -- YOU SAW IT ON THE TIMELINE, JANUARY 19TH, THE  
18          DAY AFTER ORACLE PUBLICLY ANNOUNCES ITS INTEGRATION PLANS FOR  
19          PEOPLESOFT, MR. AGASSI HAS A PRESS CONFERENCE.

20                       HE SAYS IF YOU WANT TO LOOK AT IT FROM A FINANCIALS  
21          PERSPECTIVE, THE RATIONALE -- RATIONALE FOR THE SAP ACQUISITION  
22          SO FAR TOMORROWNOW -- IS MORE AROUND THE VALUE THAT THESE  
23          CUSTOMERS REPRESENT AS POTENTIAL FUTURE SET OF CUSTOMERS FOR SAP  
24          APPLICATIONS.

25                           (DEMONSTRATIVE PUBLISHED TO JURY.)



1                   **MR. HOWARD:**   AND HE SAYS -- AND HE SAYS IT RIGHT  
2   HERE -- THE VALUE WAS ESTIMATED BY ORACLE, RIGHTFULLY OR  
3   WRONGFULLY, AS \$10 BILLION.

4                   NOW, HE'S OFF ABOUT A BILLION DOLLARS ON THE  
5   PEOPLESOFT ACQUISITION, BUT WE'LL FORGIVE HIM THAT ERROR. HE  
6   RECOGNIZES THAT THE VALUE IS IN THE CUSTOMERS, AND THAT'S WHY  
7   ORACLE PAID \$11 BILLION FOR PEOPLESOFT.

8                   AND HE SAYS, WHAT WE BELIEVE -- WHAT WE, THE SAP  
9   BOARD OF DIRECTORS, BELIEVE IS THAT THIS CUSTOMER BASE IS NOT  
10   NECESSARILY CAPTIVE BY ORACLE. REMEMBER, THAT'S THE DEAL  
11   ASSUMPTION THAT THEY'RE TRYING TO DISRUPT.

12                  ORACLE'S RISK IS THAT WE'RE GOING TO HAVE TO TRY AND  
13   KEEP THESE CUSTOMERS HAPPY. THAT'S HOW WE PAY FOR THE DEAL.  
14   THAT'S HOW WE BUILD THE NEXT PRODUCT.

15                  SAP THINKS NOW THAT WE'VE GOT TOMORROWNOW, THE  
16   CUSTOMER BASE IS NOT NECESSARILY CAPTIVE BY ORACLE, NOT SAYING  
17   HOW THEY DO IT WITH TOMORROWNOW. HE SAYS, I THINK THE CUSTOMER  
18   BASE HAS TO MAKE A CHOICE RIGHT NOW.

19                  IT'S URGENT THAT THIS HAPPEN RIGHT NOW BECAUSE THAT'S  
20   WHEN ORACLE IS ANNOUNCING ITS PLAN. THAT'S WHEN SAP THINKS IT  
21   CAN GO IN AND GET THESE CUSTOMERS. THAT'S THE IMPACT THAT  
22   THEY'RE TRYING TO HAVE.

23                  AND THAT'S HOW YOU THINK ABOUT THE VALUE. YOU GO  
24   BACK TO JANUARY -- AGAIN, THIS IS JANUARY 19TH, 2005, SITTING  
25   ACROSS THE TABLE, LOOKING EYE TO EYE, WOULD MR. AGASSI SAY THIS?

1 WOULD HE SAY THIS?

2 IF THE IDEA WAS THAT THE WAY TO GET THOSE CUSTOMERS  
3 WAS TO INFRINGE 120 COPYRIGHT REGISTRATIONS ACROSS ALL OF THESE  
4 DIFFERENT SOFTWARE PRODUCTS, WOULD HE SAY THAT IT WAS  
5 \$10 BILLION?

6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 **MR. HOWARD:** AND, AGAIN, NEXT DAY, THE SAP AG BOARD  
8 STATES THE GOAL, CONVERT 50 PERCENT, DISRUPT ORACLE'S ABILITY TO  
9 PAY FOR THE ACQUISITION, SHRINK THEIR SHARE OF THE APPLICATIONS  
10 MARKET, DISCREDIT THEIR EFFORTS TO CREATE THE NEXT GENERATION  
11 PRODUCT.

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 **MR. HOWARD:** AND ANOTHER INDICATOR OF HOW SAP VALUED  
14 TOMORROWNOW IS IN THE SET OF WHAT THEY CALLED KEY PERFORMANCE  
15 INDICATORS, KPI'S.

16 IS IT VALUED BY THE PROFITS THAT TOMORROWNOW MADE?  
17 NO. ACCUMULATED MAINTENANCE VOLUME TAKEN AWAY FROM ORACLE. AND  
18 THE IDEA IS TO HARM ORACLE, DISRUPT ORACLE, TAKE AWAY FROM  
19 ORACLE.

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 **MR. HOWARD:** SAP AG'S EXECUTIVE BOARD OF DIRECTORS  
22 STATED THE VALUE IN SLIGHTLY MORE COLORFUL TERMS. THIS IS LEO  
23 APOTHEKER. HE WAS ON THE SAP AG BOARD OF DIRECTORS. HE BECAME  
24 THE C.E.O., AND IN CORROBORATING THE VALUE THAT SAP AG PUT ON  
25 TOMORROWNOW AT THE TIME IN JANUARY OF 2005, MR. APOTHEKER SAYS,

1 THE DEAL THAT THEY'RE BIDDING ON, "I'M REALLY PISSED," IN AN  
2 EMAIL HE SENDS TO BILL MCDERMOTT, WHO'S SITTING RIGHT HERE AT  
3 THE TABLE.

4 HE SAYS, "I'M REALLY PISSED. WE NEED TO INFLICT SOME  
5 PAIN ON ORACLE. IS THERE A CHANCE TO CLOSE A FEW TN DEALS" --  
6 TOMORROWNOW DEALS -- "IN THE NEXT COMING DAYS AT EXTRAORDINARY  
7 CONDITIONS?"

8 AND THE EVIDENCE WILL SHOW THAT "EXTRAORDINARY  
9 CONDITIONS" MEANS, WHAT, 50 PERCENT? 25 PERCENT? FOR FREE?  
10 WE'LL GIVE IT AWAY. THE POINT IS TAKE THE CUSTOMERS AWAY FROM  
11 ORACLE, INFLICT PAIN, IN MR. APOTHEKER'S WORDS.

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 **MR. HOWARD:** NOW, WE HAVE A BEEN TALKING ABOUT THE  
14 LICENSE THAT ORACLE DID NOT HAVE THE OPPORTUNITY TO NEGOTIATE IN  
15 JANUARY OF 2005. THAT LICENSE IS FOR PEOPLESOFT AND JD EDWARDS  
16 SOFTWARE BECAUSE THAT'S WHAT TOMORROWNOW WAS SUPPORTING AT THE  
17 TIME THAT SAP BOUGHT IT IN 2005.

18 THERE ARE TWO OTHER LICENSES THAT YOU'LL BE ASKED TO  
19 VALUE AS PART OF THE OVERALL DAMAGES IN THIS CASE BECAUSE  
20 THERE'S TWO OTHER PRODUCTS THAT I SHOWED YOU IN THE EARLY SLIDE  
21 THAT SAP HAS ADMITTED THAT IT INFRINGED. THE FIRST IS SIEBEL,  
22 AND THE SECOND IS THE ORACLE DATABASE THAT THEY HAD COPIES OF AT  
23 TOMORROWNOW THAT THEY WERE USING TO SUPPORT THE CUSTOMERS.

24 THE SIGNIFICANCE OF SIEBEL AND THE SAME -- THE SAME  
25 FACTORS THAT WE'VE TALKED ABOUT, THE SCOPE OF THE INFRINGEMENT,

1 THE NEED FOR IT, THE KNOWING TAKING OF THE RISK AS AN  
2 INDICATOR -- ALL OF THOSE SAME FACTORS WILL ALSO APPLY TO THESE  
3 OTHER LICENSES.

4 THE SIGNIFICANCE OF SIEBEL IS THAT ON THE HEELS OF  
5 THE PEOPLESOFT ACQUISITION, ORACLE ACQUIRED SIEBEL. IT  
6 ANNOUNCED THAT ACQUISITION LATER IN 2005. AND IF THE PEOPLESOFT  
7 ACQUISITION WAS A SEISMIC EVENT IN THE ORACLE SAP COMPETITIVE  
8 RELATIONSHIP, THE SIEBEL ACQUISITION WAS A TSUNAMI.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 **MR. HOWARD:** BECAUSE SIEBEL WAS THE MARKET LEADER,  
11 THE UNDISPUTED MARKET LEADER, IN A PARTICULAR KIND OF ENTERPRISE  
12 APPLICATION SOFTWARE CALLED CUSTOMER RELATIONSHIP MANAGEMENT,  
13 CRM. AND PARTICULARLY IN COMBINATION WITH THE PEOPLESOFT DEAL,  
14 BUT EVEN BY ITSELF, THE EVIDENCE WILL SHOW THAT SAP WAS VERY  
15 THREATENED AND ACTUALLY FELT THAT ITS POSITION THAT IT ALWAYS  
16 HAD AS THE DOMINANT ENTERPRISE APPLICATION SOFTWARE COMPANY WAS  
17 NOW UNDER SERIOUS ASSAULT.

18 AND IN JANUARY OF 2006, ORACLE BOUGHT SIEBEL FOR  
19 \$6.1 BILLION.

20 AND IN RESPONSE, SAP AG BOARD OF DIRECTORS DID THE  
21 SAME THING ALL OVER AGAIN. THEY MADE THE SAME CHOICE FOR THE  
22 SAME REASONS THAT THEY HAD MADE A YEAR BEFORE, AND THEY TOLD  
23 TOMORROWNOW TO GO OUT AND SUPPORT SIEBEL SOFTWARE TO TRY AND  
24 CONVERT THOSE CUSTOMERS. TOMORROWNOW HAD NEVER SUPPORTED SIEBEL  
25 SOFTWARE. IT DIDN'T HAVE A SINGLE EMPLOYEE WHO WAS A SIEBEL

1 SOFTWARE EXPERT, SO HOW WERE THEY GOING TO DO THAT?

2 WELL, AS YOU SAW ON THE SLIDE, THEY DID IT BY MAKING  
3 31 COPIES, ILLEGAL COPIES, ADMITTED INFRINGING COPIES OF SIEBEL  
4 SOFTWARE ON THEIR SYSTEMS, AND THEY WENT OUT AND THEY STARTED  
5 RECRUITING CUSTOMERS, SO IT'S THE SAME FACTORS THAT WE LOOK AT,  
6 THE SCOPE AND DURATION OF LICENSE, THE NEED FOR THE COPYRIGHTED  
7 PROPERTY, THE WILLINGNESS TO ASSUME THE RISK AGAIN OF  
8 INFRINGEMENT, THE COMPETITIVE RELATIONSHIP WITH THE PARTIES, THE  
9 GOALS AND BUSINESS PLANS AND THE EXPECTED FINANCIAL BENEFITS.

10 (DEMONSTRATIVE PUBLISHED TO JURY.)

11 **MR. HOWARD:** THIS IS A MARKET SEGMENT. IT'S JUST A  
12 CRM MARKET. YOU CAN SEE THAT JUST BEFORE THE ACQUISITION, AGAIN  
13 FAR AND AWAY THE LEADER WITH ORACLE AND SAP KIND OF TIED FOR  
14 SECOND. AFTER -- AFTER ORACLE BUYS SIEBEL, ORACLE NOW IN JUST  
15 CRM -- THIS IS JUST CRM -- FAR AND AWAY LEADING SAP.

16 HOW DID SAP RESPOND TO THAT? OCTOBER 24TH, 2005,  
17 ABOUT A MONTH OR -- A LITTLE BIT MORE -- AFTER ORACLE ANNOUNCES  
18 ITS PLANS TO ACQUIRE SIEBEL, SAP ENGAGES IN AN EXHAUSTIVE REVIEW  
19 OF CRM.

20 AND THEY SAY IN THEIR OWN WORDS, SAP'S COMPETITIVE  
21 EDGE HAS DIMINISHED 40 PERCENT AFTER THE SIEBEL ACQUISITION.  
22 THEIR ABILITY TO WIN IS DIMINISHED BY 40 PERCENT. AND SO THEY  
23 TELL TOMORROWNOW TO GO OUT AND DO IT ALL OVER AGAIN.

24 (DEMONSTRATIVE PUBLISHED TO JURY.)

25 **MR. HOWARD:** THIS IS WHAT MR. BRANDT SAID ABOUT THAT

1 DECISION. AT SOME POINT, A DECISION WAS MADE TO EXPAND THE SAFE  
2 PASSAGE PROGRAM. THAT'S THE PROGRAM THAT THEY -- THAT WAS THE  
3 PROGRAM THROUGH WHICH TOMORROWNOW IS THE CORNERSTONE -- WAS USED  
4 IN CONJUNCTION WITH SAP TO GO OUT AND TRY AND CONVERT THIS --  
5 THESE 50 PERCENT OF THE CUSTOMERS.

6 AT THE TIME, THE DECISION WAS MADE TO EXPAND THE  
7 PROGRAM TO SIEBEL.

8 YES, THAT IS CORRECT.

9 DID ORACLE'S ACQUISITION OF SIEBEL IN ANY WAY  
10 INFLUENCE THE DECISION TO EXPAND TO INCLUDE SIEBEL?

11 AND HE ADMITS, BASICALLY, YES.

12 **THE COURT:** EXCUSE ME, COUNSEL. WE NEED TO BREAK IN  
13 ABOUT TEN MINUTES.

14 **MR. HOWARD:** I AM JUST WRAPPING UP, YOUR HONOR.

15 NOW, THERE IS ONE LAST SET OF FACTS. THE EVIDENCE  
16 WILL SHOW -- ILLUSTRATE THE EXTREME NEED THAT SAP HAD TO USE THE  
17 COPYRIGHTED SOFTWARE. AND THAT CORROBORATES WHAT THEY SAY IN  
18 THEIR OWN DOCUMENTS AT THE TIME, JANUARY OF 2005, AND REFLECTS  
19 WHY THEY MADE THE DECISION THEY MADE, TO KNOWINGLY UNDERTAKE THE  
20 RISK THAT THEY TOOK TO INFRINGE.

21 AND -- AND THAT SET OF FACTS HAS SOMETHING TO DO WITH  
22 THIS LAWSUIT. IN MARCH OF 2007, ORACLE BROUGHT THIS LAWSUIT.  
23 AND SAP HAD ANOTHER CHOICE. IT COULD HAVE STOPPED. IT ALWAYS  
24 HAD THAT CHOICE, OF COURSE. BUT HAVING BEEN SUED, IT HAD THE  
25 CHOICE TO STOP, HAD THE CHOICE TO DO THE RIGHT THING. BUT IT

1 COULDN'T -- IT COULDN'T SUPPORT THESE CUSTOMERS. IT COULDN'T  
2 CONTINUE TO COMPETE WITH ORACLE WITHOUT THE SOFTWARE.

3 AND SO THEY MADE THE DECISION FOR OVER A YEAR TO  
4 CONTINUE DOING IT. MR. WHITE'S SITTING HERE. HE MADE THAT  
5 DECISION. MR. WHITE WAS THE C.F.O. OF SAP AMERICA AT THE TIME  
6 THAT SAP BOUGHT TOMORROWNOW. HE REPORTED TO MR. BRANDT, WHO'S  
7 ALSO SITTING OVER HERE. HE IMMEDIATELY WAS PLACED ONTO THE  
8 TOMORROWNOW BOARD OF DIRECTORS STARTING IN EARLY 2005 AND ALL  
9 THE WAY THROUGH.

10 AT THE TIME THAT ORACLE BROUGHT THIS LAWSUIT,  
11 MR. WHITE WAS SENT BY SAP AG, SENT BY MR. BRANDT TO TOMORROWNOW  
12 TO DIRECTLY CONTROL ITS OPERATIONS, AND HE BECAME THE EXECUTIVE  
13 CHAIRMAN OF TOMORROWNOW.

14 THIS IS WHAT HE SAID.

15 (WHEREUPON, VIDEO WAS PLAYED AS FOLLOWS:)

16 "Q. SO AT THIS POINT, DECEMBER 2007, YOU  
17 WERE AWARE THAT TOMORROWNOW WAS SUPPORTING AT  
18 LEAST SOME CUSTOMERS VIA TOMORROWNOW \*\*\*  
19 ENVIRONMENTS; IS THAT CORRECT?

20 "A. YES.

21 "Q. HAVE YOU REPORTED TO ANYONE AT SAP THAT  
22 YOUR JANUARY DELIVERY WOULD NOT BE 100 PERCENT  
23 COMPLIANT?

24 "A. YES.

25 "Q. WHO DID YOU REPORT THAT TO?

1 "A. WERNER BRANDT."

2 **MR. HOWARD:** YOU'LL HEAR OTHER EVIDENCE ABOUT THAT.

3 ALL RIGHT. COULD I SEE SLIDE 29? I JUST HAVE TWO

4 MORE.

5 (DEMONSTRATIVE PUBLISHED TO JURY.)

6 **MR. HOWARD:** SO REMEMBER THE GOAL. THE GOAL IS TAKE  
7 50 PERCENT OF CUSTOMERS, DISRUPT ORACLE'S ABILITY TO PAY, SHRINK  
8 THEIR SHARE OF THE MARKET, DISCREDIT THEIR EFFORTS.

9 ALL RIGHT. NOW LET'S GO BACK TO THE LAST SLIDE,  
10 PLEASE.

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 **MR. HOWARD:** AS YOU SIT AND YOU LISTEN TO THE  
13 EVIDENCE IN THE CASE AND THINK ABOUT WHAT IS THE VALUE THAT SAP  
14 AND ORACLE BOTH PLACED ON THIS COPYRIGHTED SOFTWARE IN JANUARY  
15 OF 2005, THINK ABOUT THESE FACTORS. WHAT'S THE SCOPE AND THE  
16 DURATION OF LICENSE?

17 THE SCOPE IS VAST. THE EVIDENCE SHOWS THAT THIS IS A  
18 MASSIVE SCHEME OF COPYRIGHT INFRINGEMENT, THOUSANDS AND  
19 THOUSANDS OF COPIES OF ORACLE SOFTWARE SITTING ON TOMORROWNOW  
20 SYSTEMS, MILLIONS OF DOWNLOADS SCRAPED OFF OF ORACLE'S WEBSITE  
21 BY TITAN.

22 WHAT IS EACH PARTY'S NEED FOR THE COPYRIGHTED  
23 SOFTWARE? SAP DESPERATELY NEEDED IT. IT WAS THE ONLY WAY THAT  
24 THEY COULD COMBAT THIS EMERGING THREAT. AND IT WAS THE ONLY WAY  
25 THAT THEY COULD TRY AND CONVERT THESE CUSTOMERS, DISRUPT AND



1 DISCREDIT.

2 WHAT WAS SAP'S WILLINGNESS TO ASSUME THE RISK OF  
3 INFRINGEMENT LIABILITY? WELL, THE EVIDENCE WILL SHOW, AND I'VE  
4 SHOWN YOU SOME OF IT, THAT THEY DID KNOW. THEY DID KNOW THAT  
5 TOMORROWNOW WAS INFRINGING.

6 THEY ASSUMED THAT RISK BECAUSE THE REWARDS WERE SO  
7 INCREDIBLY HIGH, IN THE BILLIONS OF DOLLARS. AND THAT  
8 ASSUMPTION OF RISK IS AN ADMISSION OF THE VALUE THAT THEY PLACED  
9 ON IT HAD THEY GIVEN ORACLE THE OPPORTUNITY TO SIT DOWN AND  
10 NEGOTIATE THAT LICENSE FOR THAT SOFTWARE IN JANUARY OF 2005.

11 WHAT'S THE COMPETITIVE RELATIONSHIP WITH THE PARTIES?  
12 SAP FAR AND AWAY THE DOMINANT PLAYER, SUDDENLY FACING THIS  
13 THREAT FROM A SMALLER PLAYER IN THE ENTERPRISE APPLICATIONS  
14 MARKET BUT WHICH IS STEADILY MOVING UP FIRST WITH THE  
15 ACQUISITION OF PEOPLESOFT, THEN WITH THE ACQUISITION OF SIEBEL.  
16 AND HOW DO THEY REACT TO THAT? WELL, THEY REACT BY DECIDING TO  
17 INFRINGE.

18 WHAT ARE THEIR GOALS AND BUSINESS PLANS? WELL, THEIR  
19 GOALS ARE TO TAKE 50 PERCENT OF THE CUSTOMERS -- 50 PERCENT OF  
20 THE 10,000 PEOPLESOFT AND JD CUSTOMERS; TO HAVE A \$7 BILLION  
21 IMPACT; TO SELL THOSE CUSTOMERS SAP SOFTWARE.

22 AND WHAT ARE THE EXPECTED FINANCIAL BENEFITS?  
23 EXPECTED FINANCIAL BENEFITS AND IMPACTS TO EACH PARTY. AND THE  
24 SAME AS ALL OF THESE OTHER FACTORS, I THINK THE EVIDENCE WILL  
25 SHOW YOU AS YOU GET TO THE END OF THE CASE -- SHOW THAT THE

1 VALUE OF THAT ADMITTED INFRINGING SOFTWARE IS IN THE BILLIONS OF  
2 DOLLARS.

3 THANK YOU VERY MUCH FOR YOUR ATTENTION.

4 **THE COURT:** ALL RIGHT. THANK YOU, MR. HOWARD.

5 LADIES AND GENTLEMEN, WE'RE GOING TO TAKE OUR FIRST  
6 RECESS OF THE MORNING BEFORE WE HEAR FROM THE DEFENSE. YOU'RE  
7 EXCUSED FOR 15 MINUTES.

8 (RECESS TAKEN AT 10:29 A.M.)

9 (PROCEEDINGS RESUMED AT 10:48 A.M.)

10 **THE CLERK:** PLEASE BE SEATED AND COME TO ORDER.

11 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE  
12 OF THE JURY:)

13 **THE COURT:** OKAY. MR. MITTELSTAEDT?

14 **MR. MITTELSTAEDT:** YES, YOUR HONOR.

15 **OPENING STATEMENT**

16 **MR. MITTELSTAEDT:** IF IT PLEASE THE COURT, LADIES AND  
17 GENTLEMEN OF THE JURY. GOOD MORNING.

18 IN MOST CIVIL CASES, THE JURY HAS TWO THINGS TO  
19 DECIDE, DID THE DEFENDANT DO SOMETHING WRONG AND IF SO, HOW MUCH  
20 SHOULD THE DEFENDANT PAY THE PLAINTIFF. THIS CASE IS DIFFERENT.  
21 IT'S DIFFERENT BECAUSE TOMORROWNOW AND SAP ADMIT THEY DID  
22 SOMETHING WRONG, AND I WANT TO TELL YOU WHAT IT IS.

23 FIRST, LET ME SAY THAT, JUST TO SET THE BACKGROUND,  
24 WHEN ORACLE SELLS SOFTWARE TO A CUSTOMER, THAT CUSTOMER HAS A  
25 RIGHT TO DOWNLOAD CERTAIN MATERIALS FROM ORACLE'S WEBSITE. WHAT

1 THE CUSTOMER CAN DO WITH THOSE MATERIALS DEPENDS ON THE TERMS OF  
2 THE CONTRACT, THE LICENSE BETWEEN ORACLE AND THE CUSTOMER.

3 UNDER MOST OF THOSE LICENSES, THE CUSTOMER CAN  
4 DOWNLOAD THE MATERIALS TO ITS OWN COMPUTER, AND IT CAN USE THOSE  
5 MATERIALS TO WORK ON IT AND CAN HAVE A THIRD PARTY LIKE  
6 TOMORROWNOW HELP IT WORK ON THOSE MATERIALS, HELP IT USE THOSE  
7 MATERIALS.

8 IF THAT'S ALL THAT HAD HAPPENED HERE, IT WOULD HAVE  
9 BEEN OKAY. BUT TOMORROWNOW DID MORE. ONE OF THE THINGS IT DID  
10 WAS IT DOWNLOADED MATERIALS THAT THE CUSTOMER WAS ENTITLED TO,  
11 BUT DOWNLOADED THEM NOT TO THE CUSTOMER'S COMPUTER BUT TO  
12 TOMORROWNOW'S OWN COMPUTER. AND UNDER THE LICENSES, IT WASN'T  
13 SUPPOSED TO DO THAT.

14 TOMORROWNOW ALSO USED THOSE MATERIALS -- USED THE  
15 MATERIALS TO SERVICE OTHER CLIENTS, CLIENTS THAT HAD A RIGHT TO  
16 DOWNLOAD THE MATERIALS, BUT TOMORROWNOW JUST DOWNLOADED THEM ALL  
17 FOR ONE CUSTOMER AND THEN USED THEM FOR OTHERS. AND TOMORROWNOW  
18 ALSO DOWNLOADED MORE MATERIALS THAN A CUSTOMER WAS ENTITLED TO  
19 DOWNLOAD.

20 TOMORROWNOW ADMITS ALL OF THAT. THAT WAS WRONG. IT  
21 WAS COPYRIGHT INFRINGEMENT.

22 FOR SAP'S PART, SAP'S CONDUCT ALSO FELL SHORT OF WHAT  
23 IT SHOULD HAVE BEEN. FIRST OF ALL, SAP SHOULD NOT HAVE BOUGHT  
24 TOMORROWNOW WITHOUT MAKING SURE THAT TOMORROWNOW WAS COMPLYING  
25 WITH ORACLE'S COPYRIGHTS. AND HAVING MADE THE MISTAKE OF BUYING

1 TOMORROWNOW, SAP SHOULD HAVE MADE SURE THAT TOMORROWNOW WAS  
2 COMPLYING WITH THE COPYRIGHTS AND SHOULD HAVE MADE SURE THAT IT  
3 WAS DOING WHAT WAS RIGHT. SAP SHOULD HAVE SUPERVISED  
4 TOMORROWNOW MUCH MORE CLOSELY.

5 SAP'S BOARD TOLD TOMORROWNOW NOT TO DOWNLOAD  
6 MATERIALS ONTO THEIR OWN COMPUTERS BUT TO HAVE THEM DOWNLOADED  
7 ONTO THE CUSTOMER'S COMPUTER. THAT WAS A DIRECTIVE THAT WAS  
8 GIVEN BY THE BOARD. BUT IT WAS NOT FOLLOWED THROUGH ON, AND  
9 TOMORROWNOW DID NOT COMPLY WITH IT.

10 THE OTHER THING SAP DID WRONG WAS IT SHOULD HAVE SHUT  
11 DOWN TOMORROWNOW FASTER THAN IT DID. AND WE ADMIT ALL OF THAT.  
12 AND MORE IMPORTANT, WE ACKNOWLEDGE RESPONSIBILITY FOR IT.

13 AND WE CONTINUE TO STAND READY TO PAY ORACLE THE  
14 COMPENSATION THAT IT IS ENTITLED TO FOR THE HARM THAT WAS CAUSED  
15 TO IT, COMPENSATION THEY'RE ENTITLED TO UNDER THE LAW. AND THAT  
16 COMPENSATION IS FOR THE REVENUES THEY LOST, THE PROFITS THEY  
17 LOST IF CUSTOMERS WENT TO TOMORROWNOW (SIC) BECAUSE OF  
18 TOMORROWNOW.

19 THE OTHER COMPENSATION THEY'RE ENTITLED TO ARE THE  
20 PROFITS THAT SAP GAINED BY SELLING SOFTWARE -- SAP'S OWN  
21 SOFTWARE. THIS IS NOT SOFTWARE THAT WAS ORACLE'S BUT SELLING  
22 SAP'S SOFTWARE TO CUSTOMERS THAT CAME TO SAP ONLY BECAUSE OF  
23 TOMORROWNOW. AND I'LL EXPLAIN THOSE TWO CATEGORIES AS WE GO ON  
24 THIS MORNING.

25 WHAT YOU WILL HEAR, THOUGH, IS ORACLE WANTS MUCH MORE

1 THAN THAT. IN ADDITION TO A LONG PUBLIC TRIAL WHERE THEY TROT  
2 OUT EVIDENCE OF THINGS WE'VE ALREADY ADMITTED TO, THEY WANT A  
3 WINDFALL. THEY WANT A BONANZA THAT IS OUT OF ALL PROPORTION TO  
4 THE HARM THAT THEY SUFFERED. AND IN A NUTSHELL, THAT'S WHAT  
5 THIS CASE IS ABOUT.

6 THE ONE STUBBORN FACT THAT IS GOING TO BE IMPORTANT  
7 THROUGHOUT THIS CASE IS THAT OF THE 9- OR 10,000 CUSTOMERS THAT  
8 PEOPLESOFT HAVE -- HAD THAT YOU HEARD ABOUT, THE NUMBER OF THOSE  
9 CUSTOMERS WHOEVER WENT TO TOMORROWNOW IS ONLY 358. AND I SAY  
10 THAT'S A STUBBORN FACT BECAUSE NOBODY CAN DISPUTE IT, AND IT  
11 MEANS THAT DESPITE THE PLANS AND THE HOPES AND THE EXPECTATIONS  
12 OR THE HYPE THAT ANYBODY HAD OF ALL THOSE 9-, 10,000 CUSTOMERS  
13 FROM PEOPLESOFT, ONLY 358 EVER WENT TO TOMORROWNOW. AND SO WHEN  
14 WE START LOOKING AT THE HARM THAT WAS CAUSED TO ORACLE, WE START  
15 WITH THAT 358.

16 THAT, IN A NUTSHELL, IS WHAT THIS CASE IS ABOUT. AND  
17 THE EVIDENCE WILL SHOW THE COMPENSATION THAT ORACLE IS ENTITLED  
18 TO IS IN THE MILLIONS, THE TENS OF MILLIONS. IT'S NOT IN THE  
19 BILLIONS.

20 OKAY. BEFORE I GO FURTHER AND TELL YOU HOW THE  
21 EVIDENCE IS GOING TO SHOW ALL OF THAT, LET ME MAKE SOME  
22 INTRODUCTIONS.

23 FIRST LET ME START WITH BILL MCDERMOTT.  
24 MR. MCDERMOTT IS ONE OF TWO CHIEF EXECUTIVE OFFICERS OF --  
25 C.E.O.'S OF SAP AG. HE WAS GIVEN THAT POSITION IN FEBRUARY OF

1 THIS YEAR. HE IS BASED JUST OUTSIDE OF PHILADELPHIA HERE IN THE  
2 UNITED STATES. AND HE WILL TESTIFY ABOUT A NUMBER OF THE THINGS  
3 THAT I'M GOING TO BE TALKING ABOUT TODAY. AND HE, I WILL TELL  
4 YOU, WILL DO IT MUCH MORE ELOQUENTLY THAN I CAN.

5 MR. BRANDT, IF YOU WOULD STAND UP.

6 MR. BRANDT IS THE CHIEF FINANCIAL OFFICER OF SAP AG.  
7 YOU WERE INTRODUCED TO HIM YESTERDAY. HE WILL ALSO TESTIFY.

8 AND THEN ALSO WITH US IS MR. MARK WHITE, WHO IS THE  
9 EXECUTIVE CHAIRMAN NOW OF TOMORROWNOW. HE'S ALSO THE C.F.O. OF  
10 SAP AMERICA.

11 AND MY PARTNER GREG LANIER.

12 LET ME GIVE YOU A LITTLE BIT OF BACKGROUND THAT I  
13 THINK WILL MAKE SOME OF THIS CLEAR. AND IF I CAN STEP TO THE  
14 EASEL, YOUR HONOR.

15 **THE COURT:** CERTAINLY.

16 **MR. MITTELSTAEDT:** THIS IS NOT HIGH-TECH, BUT IT  
17 OCCURRED TO ME AS I WAS LISTENING TO ORACLE THAT THIS  
18 EXPLANATION MAY HELP.

19 ORACLE SELLS SOFTWARE, THE BUSINESS SOFTWARE THAT  
20 YOU'VE HEARD ABOUT. IT ALSO PROVIDES HELP, AND I THINK THAT  
21 THIS IS SORT OF THE HELP DESK YOU CALL WHEN YOU HAVE A PROBLEM  
22 WITH YOUR COMPUTER SOFTWARE. YOU'LL HEAR THIS REFERRED TO  
23 MOSTLY AS "SUPPORT." IT'S ALSO REFERRED TO AS MAINTENANCE. BUT  
24 YOU CAN THINK OF IT AS "HELP" OR AS "SUPPORT."

25 AND THEN ORACLE ALSO PROVIDES NEW SOFTWARE.

1 AND SO IF A CUSTOMER -- AND THIS IS WHAT ORACLE  
2 PROVIDE -- IF A CUSTOMER BUYS SOFTWARE IN ORACLE, IT PAYS  
3 WHATEVER THE AMOUNT IS. AND IF IT ALSO WANTS TO BUY THE HELP  
4 AND THE RIGHT TO GET NEW UPGRADES OR THE NEW SOFTWARE, IF AND  
5 WHEN IT COMES OUT, THE NEW VERSION, THE NEW RELEASE, IT ALSO  
6 PAYS 22 PERCENT OF WHATEVER THIS PRICE IS.

7 AND SO IF THE PRICE FOR THE SOFTWARE IS A HUNDRED  
8 DOLLARS -- AND IT'S NOT, IT'S MILLIONS OF DOLLARS, BUT TO MAKE  
9 IT EASY -- IF THE CUSTOMER IS CHARGED A HUNDRED DOLLARS BY  
10 ORACLE FOR THE SOFTWARE, THEN IT PAYS \$22 A YEAR FOR THE RIGHT  
11 TO HAVE SUPPORT, TO DOWNLOAD MATERIALS FROM THE WEBSITE THAT  
12 YOU'VE HEARD ABOUT AND ALSO FOR THE RIGHT TO GET NEW UPGRADES  
13 WHEN AND IF ORACLE ISSUES THOSE UPGRADES.

14 WELL, THERE'S A LOT OF CUSTOMERS LIKE THIS,  
15 ESPECIALLY IF THEY'RE GOING TO STAY IN BUSINESS A LONG TIME,  
16 CONTINUE TO INCREASE WHAT THEY DO AND THEY WANT TO BE IN LINE TO  
17 GET THESE NEW SOFTWARE UPGRADES.

18 BUT THERE'S ALSO A CATEGORY OF CUSTOMERS YOU'LL HEAR  
19 A LOT ABOUT IN THIS CASE WHO DECIDE THAT THEY'RE NOT INTERESTED  
20 IN UPGRADING TO NEW SOFTWARE IF AND WHEN IT COMES ABOUT. ALL  
21 THEY WANT IS SOME HELP, AND IF THEY JUST WANT HELP, THEY STILL  
22 HAVE TO PAY THE 22 PERCENT EACH YEAR TO ORACLE. SO THEY HAVE  
23 SOME CHOICES, THESE CUSTOMERS WHO ONLY WANT THE HELP.

24 THEY CAN GO TO SELF SUPPORT. AND I'LL JUST WRITE  
25 "SS." THAT JUST MEANS TAKING IT IN-HOUSE AND HAVING SOMEBODY ON

1 YOUR STAFF ACTUALLY PROVIDE THE SUPPORT, LIKE A LOT OF COMPANIES  
2 DO. ANOTHER POSSIBILITY IS TO GO TO -- AND I'LL JUST PUT "TP"  
3 FOR THIRD PARTIES. THESE ARE COMPANIES WHO PROVIDE JUST THE  
4 SUPPORT, JUST THE HELP, BUT THEY'RE NOT IN THE SOFTWARE BUSINESS  
5 SO THEY'RE NOT GIVING THE RIGHT TO NEW UPGRADES.

6 AND TOMORROWNOW WAS ONE OF THESE THIRD-PARTY SUPPORT  
7 COMPANIES. AND SO THEY ATTRACTED CUSTOMERS WHO, FOR WHATEVER  
8 REASON, DIDN'T WANT TO CONTINUE PAYING 22 PERCENT A YEAR TO  
9 ORACLE AND WANTED JUST TO PAY A LESSER AMOUNT AND JUST GET THE  
10 HELP, NOT BE IN LINE FOR THE NEW UPGRADES.

11 WITH THAT BACKGROUND, LET ME TALK ABOUT THE TWO  
12 CATEGORIES OF CUSTOMERS THAT WE OWE ORACLE MONEY FOR.

13 (DEMONSTRATIVE PUBLISHED TO JURY.)

14 **MR. MITTELSTAEDT:** THE FIRST ARE THE CUSTOMERS THAT  
15 WENT TO TOMORROWNOW. THEY USED TO BE AT PEOPLESOFT OR ORACLE,  
16 THEY GO TO TOMORROWNOW FOR HELP, AND IT'S THE CUSTOMERS THAT GO  
17 TO TOMORROWNOW BECAUSE OF TOMORROWNOW. THEY LEAVE ORACLE  
18 BECAUSE THEY LIKE WHAT TOMORROWNOW IS DOING.

19 WE ADMIT THAT TOMORROWNOW WAS INFRINGING COPYRIGHTS.  
20 AND FOR EVERY CUSTOMER THAT LEFT ORACLE BECAUSE OF TOMORROWNOW,  
21 WE'RE GOING TO PAY THEM PROFITS THAT THEY LOST. BUT THAT'S NOT  
22 ALL 358, BECAUSE A LOT OF THOSE CUSTOMERS WOULD HAVE LEFT ORACLE  
23 ANYWAY.

24 AND WHY WOULD THEY HAVE LEFT ORACLE ANYWAY? IS  
25 BECAUSE THEY WERE THE CUSTOMERS WHO DECIDED THEY DIDN'T WANT



1 HELP. AND SO THEY WERE EITHER GOING TO GO ON SELF SUPPORT.  
2 THEY WERE GOING TO GO WITH ANOTHER THIRD PARTY, OR THEY WERE  
3 GOING TO GO WITH TOMORROWNOW. THEY WERE WILLING TO LEAVE ORACLE  
4 ANYWAY, AND ORACLE WAS NOT GOING TO CONTINUE TO HAVE THE PROFITS  
5 FROM THOSE SALES, THOSE 22 PERCENT A YEAR.

6 AND SO FOR THAT CATEGORY OF CUSTOMER, WE DON'T OWE  
7 ORACLE.

8 NOW, YOU MIGHT ASK, WELL, WHY WOULD ANYBODY LEAVE  
9 ORACLE EXCEPT FOR TOMORROWNOW? WHY AREN'T ALL THESE 358  
10 CUSTOMERS IN THIS DAMAGE POOL THAT WE HAVE TO COMPENSATE THEM  
11 FOR?

12 WELL, THE EVIDENCE ON THAT WILL COME FROM ORACLE'S  
13 OWN DOCUMENTS AND THEIR OWN WITNESSES. IT WILL ALSO COME FROM  
14 CUSTOMERS, AND IT WILL COME FROM SAP WITNESSES. AND LET ME JUST  
15 GIVE YOU A LITTLE BIT OF A PREVIEW TO HELP YOU FOLLOW THE  
16 EVIDENCE DURING THE TRIAL.

17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 **MR. MITTELSTAEDT:** THIS FIRST DOCUMENT IS FROM --  
19 IT'S AN INTERNAL ORACLE EMAIL AND GOES TO MR. CHARLES PHILLIPS.  
20 HE WAS ONE OF THE COPRESIDENTS OF ORACLE. SO HE'S -- THIS IS AT  
21 A TOP LEVEL. AND WHAT HE'S SAYING -- AND THIS IS DECEMBER OF  
22 2005, SO IT'S ALMOST A YEAR AFTER TOMORROWNOW'S ACQUISITION.

23 CAN PEOPLE SEE THAT OKAY? ARE YOU --

24 **A JUROR:** I CAN. THANK YOU.

25 **MR. MITTELSTAEDT:** OKAY.

1                   AND WHAT IT SAYS IS SINCE THE ACQUISITION,  
2 TOMORROWNOW HAS CAPTURED LESS THAN 1 PERCENT OF  
3 PEOPLESOFT/JD EDWARDS SUPPORT REVENUE OR ABOUT 30 CUSTOMERS.  
4 THIS IS A YEAR INTO IT.

5                   AND THEN HE SAYS, SINCE 6 PERCENT OF OUR SUPPORT  
6 CONTRACTS DON'T RENEW ANYWAY -- AND THAT MEANS, YOU KNOW, EVERY  
7 YEAR WHEN YOU HAVE TO RENEW OR YOU HAVE THE DECISION, DO YOU  
8 WANT TO RENEW SUPPORT OR THE HELP CONTRACT, HE SAYS 6 PERCENT  
9 DON'T RENEW ANYWAY. THIS LOSS TO TOMORROWNOW, THE 1 PERCENT, IS  
10 MINIMAL.

11                   AND THEN HE SAYS -- AND THIS IS THE KEY POINT -- SOME  
12 OF THESE CUSTOMERS WOULD PROBABLY HAVE LEFT ORACLE ANYWAY,  
13 MEANING THEY WOULD HAVE LEFT EVEN WITHOUT TOMORROWNOW. AND  
14 THAT'S THE CATEGORY OF CUSTOMER THAT WE SHOULDN'T HAVE TO  
15 COMPENSATE ORACLE FOR.

16                   ORACLE HAD A NAME FOR THESE CUSTOMERS WHO WERE IN  
17 DANGER OF LEAVING ANYWAY. THEY CALLED THEM AT-RISK CUSTOMERS.  
18 AND YOU'LL HEAR A LOT OF EVIDENCE ABOUT WHICH CUSTOMERS WERE AT  
19 RISK OF LEAVING REGARDLESS OF TOMORROWNOW. AND THEY WERE  
20 CUSTOMERS THAT HAD OLD SOFTWARE APPLICATIONS, AND THEY WERE  
21 HAPPY WITH THOSE. THEY DIDN'T NEED MUCH SUPPORT. THEY DIDN'T  
22 WANT TO SPEND 22 PERCENT A YEAR BECAUSE THEY DIDN'T CARE ABOUT  
23 BEING IN LINE FOR NEW SOFTWARE.

24                   THEY WERE ALSO CUSTOMERS WHO HAD CUSTOMIZED THEIR  
25 SOFTWARE. YOU KNOW, CHANGED THE SOFTWARE SO MUCH TO ADAPT IT TO

1 THEIR BUSINESS THAT ORACLE WAS NOT MUCH OF A POSITION TO GIVE  
2 THEM MUCH HELP OR SUPPORT ANYWAY. AND THEY WERE ALSO  
3 CUSTOMERS -- THESE CUSTOMERS WHO WERE AT RISK OF LEAVING  
4 REGARDLESS OF TOMORROWNOW, THEY WERE ALSO CUSTOMERS WHO WERE  
5 WORRIED ABOUT THE EFFECT OF ORACLE'S HOSTILE TAKE-OVER OF  
6 PEOPLESOFT.

7 AND IMAGINE A CUSTOMER WHO'S -- HAS PEOPLESOFT  
8 SOFTWARE RUNNING THEIR BUSINESS. IT'S REAL IMPORTANT. AND THEN  
9 ORACLE COMES ALONG AND BUYS PEOPLESOFT AND RAISES SOME  
10 UNCERTAINTY ABOUT WHETHER ORACLE IS GOING TO CONTINUE TO UPGRADE  
11 THE PEOPLESOFT SOFTWARE THAT THEY'RE ON OR WHETHER ORACLE IS  
12 GOING TO SWITCH THEM OFF OF PEOPLESOFT AND PUT THEM ON TO SOME  
13 OTHER SOFTWARE, SOME NEW ORACLE SOFTWARE. THAT CAUSED A LOT OF  
14 CONCERN FOR SOME -- SOME CUSTOMERS.

15 LET ME GIVE YOU AN EXAMPLE.

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 **MR. HOWARD:** YOU'LL HEAR THIS MAN AT TRIAL. HIS NAME  
18 IS JOHN KREUL, AND HE'S -- HE'S A TOP EXECUTIVE OF PEPSI, PEPSI  
19 AMERICA. AND HE WROTE A DOCUMENT EXPLAINING WHY HE WAS LEAVING  
20 ORACLE'S SUPPORT. AND ONE OF HIS COMMENTS WAS "WE SHOULD NOT  
21 FUND UNCERTAINTY."

22 AND THEN AT HIS DEPOSITION, WE ASKED HIM, WELL, WHAT  
23 DID YOU MEAN BY THAT? AND WHAT HE SAID IS, "WE FELT THAT THE  
24 PEOPLESOFT PRODUCTS SUITE" -- THAT'S WHAT THEY HAD BEEN USING  
25 BEFORE ORACLE -- "DID NOT FIT WELL INTO OUR FUTURE BUSINESS

1 DIRECTION AND THAT WHEN ORACLE ACQUIRED PEOPLESOFT, THERE WAS NO  
2 CLEAR DIRECTION OF WHERE THEY WERE GOING TO TAKE THE SOFTWARE SO  
3 WE DID NOT WANT TO -- WITH THE MAINTENANCE FEES THAT WE WERE  
4 PAYING, WE DID NOT WANT TO FUND FUTURE LICENSE OR FUTURE RIGHTS  
5 TO UPGRADED VERSIONS THAT MOST LIKELY WE WOULD NOT NEED."

6 SO HE'S ONE CATEGORY OR AN EXAMPLE OF ONE CATEGORY OF  
7 CUSTOMER WHO WAS GOING TO LEAVE ORACLE ANYWAY.

8 AS I SAY, ORACLE KNEW THAT THERE WERE CUSTOMERS LIKE  
9 THAT, AND THEY HAD NAMES FOR THEM. YOU'LL HEAR TESTIMONY AT THE  
10 TRIAL FROM ONE OF THE TOP EXECUTIVES AT ORACLE, A MAN NAMED JUAN  
11 JONES. MR. JONES WAS ONE STEP AWAY FROM THE TOP. HE REPORTED  
12 TO ONE MAN, WHO THEN REPORTED TO LARRY ELLISON.

13 HE WROTE AN EMAIL AFTER REVIEWING THE CUSTOMER SURVEY  
14 THAT TALKED ABOUT WHY CUSTOMERS WERE DISSATISFIED WITH ORACLE AT  
15 THE TIME. AND HERE'S WHAT HE SAID.

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 **MR. MITTELSTAEDT:** THIS IS JUAN JONES IN DECEMBER OF  
18 2005. SO, AGAIN, ABOUT A YEAR AFTER THE ACQUISITION.

19 AND WHAT HE SAYS IS, "LET THE" BLANK "DREAM OF  
20 REDUCING THEIR MAINTENANCE FEES. I JUST FINISHED TELLING  
21 TOYOTA," ONE OF THEIR CUSTOMERS, "THAT WE'RE NOT GOING TO REDUCE  
22 THEIR BILL. NOT ONLY THAT, BUT THEY NEED TO BUY MORE SOFTWARE  
23 FROM US."

24 SO THERE WERE PLENTY OF REASONS FOR CUSTOMERS TO WANT  
25 TO LEAVE ORACLE REGARDLESS OF TOMORROWNOW IF THIS IS HOW ORACLE

1 THOUGHT OF THEIR CUSTOMERS.

2 ORACLE HAD ANOTHER NAME FOR THOSE CUSTOMERS THAT  
3 DIDN'T WANT TO RENEW THEIR SOFTWARE AND BUY MORE SOFTWARE, AND  
4 THIS IS MR. JONES AGAIN.

5 (DEMONSTRATIVE PUBLISHED TO JURY.)

6 **MR. MITTELSTAEDT:** WHAT HE SAYS ABOUT TOMORROWNOW --  
7 AND THIS IS ALMOST TWO YEARS AFTER THE ACQUISITION, "IF  
8 TOMORROWNOW GETS A BUNCH OF LAGGARD CUSTOMERS WHO DON'T WANT TO  
9 MOVE TO ANYTHING, INCLUDING SAP, THEN THAT'S NOT NECESSARILY A  
10 BAD THING STRATEGICALLY."

11 SO IF CUSTOMERS DON'T WANT TO BE IN LINE TO BUY NEW  
12 SOFTWARE IN ORACLE, ORACLE DIDN'T WANT THEM. THAT WAS THE  
13 ATTITUDE. CONTRAST THAT, IF YOU WILL, WHEN YOU HEAR TESTIMONY  
14 FROM THE ORACLE EXECUTIVES ABOUT HOW THREATENED THEY FELT BY  
15 TOMORROWNOW.

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 **MR. MITTELSTAEDT:** HERE'S ANOTHER EXAMPLE AGAIN, FROM  
18 MR. JONES. "TOMORROWNOW IS NOW WELCOME TO HAVE KOONTZ-WAGNER,  
19 ANOTHER COMPANY, ANOTHER CUSTOMER, AS A CUSTOMER WHO FEELS LIKE  
20 IT COULD RUN ITS CURRENT VERSION OF JDE WORLD, ONE OF THE  
21 SOFTWARES THEY WERE RUNNING FOR ANOTHER FIVE YEARS, MAYBE MORE.  
22 THAT IS A CUSTOMER I WOULD WANT TO 'FIRE' ANYWAY. LET THEM BE A  
23 DRAG ON TOMORROWNOW INSTEAD."

24 I'M NOT PUTTING THIS UP TO CRITICIZE ORACLE FOR ITS  
25 ATTITUDE TOWARDS CUSTOMERS. I'M PUTTING IT UP AT -- TO

1 ILLUSTRATE THE POINT THAT ORACLE WAS GOING TO LOSE CUSTOMERS  
2 ANYWAY, AND IT'S UNFAIR FOR THEM TO EXPECT US TO PAY THEM  
3 COMPENSATION FOR EVERY CUSTOMER THEY LEFT (SIC) WHEN THIS WAS  
4 THEIR ATTITUDE TOWARDS CUSTOMERS, AND WHEN AT THE TIME, THEY  
5 DIDN'T SEEM TO MIND LOSING CUSTOMERS TO TOMORROWNOW.

6 IT WAS THIS TYPE OF CUSTOMERS, THE LAGGARDS, THE  
7 PEOPLE WHO LAG BEHIND, THE ONES THAT DIDN'T WANT TO BUY MORE  
8 SOFTWARE, THE ONES ORACLE WANTED TO FIRE ANYWAY -- IT'S THOSE  
9 KIND OF CUSTOMERS THAT WERE GOING TO GO SELF-SUPPORT OR GO TO  
10 SOME THIRD PARTY ANYWAY. THEY WERE GOING TO LEAVE ORACLE, AND  
11 ORACLE SAID THEY DIDN'T MIND LOSING THOSE CUSTOMERS. BUT NOW  
12 THEY ARE TRYING TO GET US TO COMPENSATE THEM FOR THESE  
13 CUSTOMERS. AND THAT GOES BEHIND THE LINE, I THINK.

14 SO THE BOTTOM LINE FOR THIS FIRST CATEGORY OF  
15 CUSTOMERS --

16 (DEMONSTRATIVE PUBLISHED TO JURY.)

17 **MR. MITTELSTAEDT:** -- THE ONES WHO LEFT HELP TO GO TO  
18 TOMORROWNOW -- YOU'LL HEAR ONE OF OUR ACCOUNTANTS AND ONE OF  
19 ORACLE'S ACCOUNTANTS. THESE ARE EXPERT WITNESSES WHO HAVE BEEN  
20 RETAINED BY BOTH SIDES. AND BOTH OF THEM TALLY UP THE NUMBER OF  
21 CUSTOMERS WHO THEY THINK, BASED ON THE EVIDENCE, THEY'VE SEEN  
22 LEFT ORACLE BECAUSE OF TOMORROWNOW.

23 OUR ACCOUNTANT SAYS IT'S ABOUT 200 OUT OF THE 358.  
24 THEIR ACCOUNTANT SAYS IT'S ABOUT 270 OUT OF THE 358. FOR OUR  
25 200, THE WAY WE COUNT THEM UP, THAT'S ABOUT \$32 MILLION. AND

1 WHEN I SAY \$32 MILLION, THAT FIGURE IS THE PROFIT THAT ORACLE  
2 LOST ON THOSE CUSTOMERS. SO OF THE 9,000 PEOPLESFT/ORACLE  
3 CUSTOMERS, 358 GO TO TOMORROWNOW FOR SUPPORT, AND ABOUT 200  
4 THEM -- 200 OF THEM ARE CUSTOMERS THAT WE ACKNOWLEDGE WOULD NOT  
5 HAVE LEFT ORACLE BUT FOR TOMORROWNOW. AND SO WE OWE THEM MONEY  
6 FOR THAT.

7 LET'S DO A REALITY CHECK. YOU KNOW, IS THIS 30,  
8 \$32 MILLION, IN THE BALLPARK. WE SAY IT IS, AND THERE'S A  
9 COUPLE OF MARKERS. ONE IS TOMORROWNOW'S VALUE WAS \$10 MILLION.  
10 THEY NEVER MADE ANY PROFIT. AND SO \$32 MILLION COMPENSATION TO  
11 ORACLE IS ABOUT THREE TIMES WHAT WE PAID FOR TOMORROWNOW. SO  
12 IT'S IN THE BALLPARK. THAT'S NOT THE WAY TO CALCULATE WHAT WE  
13 OWE THEM, BUT IT SHOWS THAT IT'S IN THE BALLPARK.

14 BEFORE GOING ON TO THIS SECOND CATEGORY OF CUSTOMERS,  
15 LET ME -- LET ME PAUSE TO SAY THIS: ORACLE'S ACCOUNTANT  
16 CALCULATED DAMAGES IN TWO WAYS. ONE WAY WAS THE SAME WAY WE DID  
17 IT. HE WENT CUSTOMER BY CUSTOMER AND ASKED WOULD THIS CUSTOMER  
18 HAVE GONE -- HAD LEFT ORACLE ANYWAY, WOULD THE CUSTOMER HAVE  
19 GONE TO SAP ANYWAY, OR WOULD ORACLE HAVE LOST THAT CUSTOMER  
20 ANYWAY.

21 AND THE TWO EXPERTS DISAGREE ON HOW MANY CUSTOMERS  
22 ARE -- ARE IN EACH CATEGORY, BUT THEY AGREED ON THE APPROACH.  
23 AND YOU DIDN'T HEAR ANYTHING FROM ORACLE'S LAWYERS THIS MORNING  
24 ABOUT THEIR EXPERT, THEIR ACCOUNTANT, CALCULATING DAMAGES IN THE  
25 SAME WAY WE DO.

1 THE REASON IS THAT WHEN HE -- WHEN THEIR EXPERT CAME  
2 UP WITH A NUMBER, IT WAS IN THE MILLIONS. AND SO INSTEAD OF  
3 SAYING ANYTHING ABOUT ALL THAT WORK HE DID AND THE MILLIONS OF  
4 DOLLARS, YOU KNOW, HE -- HE EXPENDED IN ORDER TO CREATE THAT  
5 DAMAGE THEORY, THEY NOW APPARENTLY HAVE JUST BRUSHED THAT AWAY,  
6 ACTED LIKE IT NEVER HAPPENED. AND THEY'VE GONE ON TO THIS OTHER  
7 THEORY, AND I'LL TALK MORE ABOUT THAT.

8 BUT MY POINT IS ORACLE AGREES THAT THIS IS ONE WAY TO  
9 CALCULATE DAMAGES, AND WE SAY IT'S THE -- THE FAIR WAY TO DO IT.

10 LET ME GO NOW TO THE SECOND CATEGORY. THESE ARE SAP  
11 SOFTWARE CUSTOMERS --

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 **MR. MITTELSTAEDT:** -- THAT BOUGHT SAP SOFTWARE  
14 BECAUSE OF TOMORROWNOW. THAT'S A MOUTHFUL, AND I'LL EXPLAIN  
15 WHAT IT MEANS.

16 TO SET THE CONTEXT FOR THIS, LET ME CLEAR UP  
17 SOMETHING THAT I THINK'S VERY IMPORTANT. IN ONE OF THEIR EARLY  
18 SLIDES -- AND I'VE GOT IT HERE -- THEY SAID, SAP CHOSE TO USE  
19 ORACLE SOFTWARE. LATER ON, THEY WERE CLEARER AND THEY SAID ONLY  
20 TOMORROWNOW WAS USING THE SOFTWARE, AND TOMORROWNOW IS USING THE  
21 SOFTWARE NOT TO TAKE IT OUT ON THE STREET AND SAY, YOU KNOW,  
22 HERE'S SOME ORACLE SOFTWARE AND WE'RE GOING TO PUT OUR NAME ON  
23 IT AND SELL IT, YOU KNOW, AS THE SOFTWARE.

24 ALL WE'RE TALKING ABOUT IS THE HELP, THE SUPPORT  
25 MATERIALS, AND I'VE TOLD YOU WHAT TOMORROWNOW DID ON THAT. BUT



1 ON SAP SOFTWARE, SAP SOFTWARE, THIS BUSINESS APPLICATION  
2 SOFTWARE WAS SAP SOFTWARE. AND TO MAKE SURE IT WAS SAP  
3 SOFTWARE, SAP'S BOARD ISSUED SOMETHING CALLED RULES OF  
4 ENGAGEMENT WITH TOMORROWNOW. AND WHAT THEY DID WAS ESTABLISH AN  
5 IRON WALL BETWEEN SAP AND TOMORROWNOW. THEY KNEW THAT  
6 TOMORROWNOW WAS GOING TO HAVE ACCESS TO ORACLE'S SOFTWARE, AND  
7 THERE WAS NOTHING WRONG WITH HAVING ACCESS.

8 IF I CAN GO BACK TO THE EASEL, YOU KNOW, EVERYBODY  
9 AGREES THAT THESE CUSTOMERS HAD A RIGHT TO DOWNLOAD MATERIALS  
10 AND THEY HAD A RIGHT -- TOMORROWNOW OR OTHER THIRD-PARTY  
11 SUPPORTERS TO HAVE ACCESS TO THAT. AND SO SAP WANTED TO MAKE  
12 SURE THAT ANY ORACLE SOFTWARE WOULDN'T GO TO SAP.

13 AND SO WHEN THEY SAY SAP CHOSE TO USE ORACLE  
14 SOFTWARE, THEY DON'T REALLY MEAN THAT. THEY MEAN TOMORROWNOW  
15 WAS USING IT. AND SO WHEN WE GET TO THIS SECOND CATEGORY OF --  
16 OF CUSTOMERS, CUSTOMERS THAT USED TO BE AT PEOPLESOFT OR ORACLE  
17 AND THEN SWITCHED AND BECAME SAP CUSTOMERS. THERE'S A LOT OF  
18 CUSTOMERS IN THAT CATEGORY, ABOUT 86 IN TOTAL. AND THE QUESTION  
19 IS HOW MANY OF THEM SWITCHED FROM ORACLE TO SAP BECAUSE OF  
20 TOMORROWNOW.

21 AND YOU WOULDN'T EXPECT MANY CUSTOMERS TO BE IN THAT  
22 CATEGORY, AND LET ME TELL YOU WHY. AS ORACLE'S COUNSEL HAS  
23 SAID, MAKING A SWITCH OF SOFTWARE -- THIS IS THE SOFTWARE THAT  
24 RUNS YOUR BUSINESS -- IS A REAL BIG DEAL. IT'S LIKE -- ONE WAY  
25 OF THINKING OF IT IS REPLUMBING YOUR ENTIRE HOUSE. OR IF YOU

1 THINK OF A GROCERY STORE, IT'S REMOVING ALL THE SHELVING, TAKING  
2 ALL THE MATERIALS OFF, ALL THE FOOD, EVERYTHING OFF THE  
3 SHELVING, REPLACING THAT SHELVING, AND THEN PUTTING ALL THE  
4 MATERIALS BACK AND TRYING TO DO IT WHILE YOU'RE STILL RUNNING  
5 YOUR BUSINESS.

6 IT'S EXPENSIVE, AND IT'S DISRUPTIVE, AND COMPANIES  
7 DON'T MAKE A BIG DECISION LIKE THAT WITHOUT A REALLY GOOD REASON  
8 TO DO IT.

9 AND GETTING HALF PRICE ON YOUR SUPPORT FOR YOUR OLD  
10 ORACLE SOFTWARE DURING THIS TRANSITION PERIOD IS NOT A GOOD  
11 REASON OR GOOD ENOUGH REASON FOR A COMPANY TO DECIDE TO LEAVE  
12 ORACLE AND GO TO SAP TO BUY SAP SOFTWARE.

13 OKAY. THAT'S WHAT I SAY. WHAT'S THE BASIS FOR THAT?  
14 WELL, YOU'LL HEAR THE TESTIMONY FROM ORACLE THEMSELVES, FROM  
15 CUSTOMERS, AND FROM SAP ON HOW COMPANIES MAKE THAT DECISION TO  
16 SWITCH FROM ONE SUPPLIER TO ANOTHER.

17 AND LET ME START WITH ORACLE. AND REMEMBER, JUST SO  
18 WE'RE CLEAR, WE'RE TALKING NOW ABOUT CUSTOMERS WHO GO TO SAP TO  
19 BUY THEIR SOFTWARE. IF THEY GO TO SAP TO BUY THEIR SOFTWARE,  
20 COMPLETELY UNRELATED TO TOMORROWNOW, THEN WE DON'T OWE ORACLE  
21 FOR THE PROFITS WE MADE ON THAT SOFTWARE SALE. THAT'S JUST FAIR  
22 COMPETITION. IF THOSE CUSTOMERS CAME TO US AND BOUGHT OUR  
23 SOFTWARE BECAUSE OF TOMORROWNOW, WE ADMIT WE OWE ORACLE THE  
24 PROFITS WE MADE ON THAT. SO WE'VE GOT TO DISTINGUISH WHY  
25 CUSTOMERS CAME TO SAP.

1                   THIS CASE IS ALL ABOUT CUSTOMERS, HOW CUSTOMERS MADE  
2 THE DECISIONS THEY MADE, AND YOU'LL HEAR A LOT OF TESTIMONY ON  
3 THAT. AND THE REASON YOU'LL BE HEARING TESTIMONY IS -- IS WHAT  
4 IN LEGAL TERMINOLOGY IS CALLED CAUSATION. WHAT CAUSED THESE  
5 CUSTOMERS TO MAKE THE DECISION THEY DID? WAS IT TOMORROWNOW?

6                   IF IT'S TOMORROWNOW, WE OWE THEM COMPENSATION. IF  
7 IT'S SOMETHING ELSE, WE DON'T. IT WOULD BE A WINDFALL FOR THEM  
8 TO SAY EVERY TIME ORACLE LOSES A CUSTOMER TO SAP, SAP'S GOT TO  
9 PAY US. THAT WOULDN'T MAKE ANY SENSE. THEIR ONLY HOOK HERE IS  
10 TOMORROWNOW, SO THEY'VE GOT TO TIE IN CUSTOMERS TO TOMORROWNOW.

11                   SO HERE'S -- HERE'S WHAT ORACLE SAID.

12                   (DEMONSTRATIVE PUBLISHED TO JURY.)

13                   **MR. MITTELSTAEDT:** THIS IS MR. PHILLIPS, AGAIN,  
14 COPRESIDENT OF ORACLE. AND THE QUESTION AT THE DEPOSITION WAS,  
15 "IN ANY OF THE INTERACTIONS THAT YOU'VE HAD WITH CUSTOMERS THAT  
16 ARE CONSIDERING A SWITCH ONE WAY OR THE OTHER, FROM ORACLE TO  
17 SAP OR SAP TO ORACLE, HAVE ANY OF THEM EVER MENTIONED  
18 MAINTENANCE OR SUPPORT AS A FACTOR IN THEIR DECISION?"

19                   SO IN OTHER WORDS, WHEN YOU'RE SWITCHING SOFTWARE  
20 SUPPLIERS, ARE YOU DOING THAT BECAUSE OF MAINTENANCE OR SUPPORT  
21 WHERE YOU'RE GETTING THAT?

22                   MR. PHILLIPS: THAT'S NEVER BEEN AN ISSUE. THAT --  
23 THAT WOULDN'T BE THE REASON NORMALLY THAT PEOPLE WOULD SWITCH.

24                   AND WHY WOULDN'T IT BE THE REASON?

25                   IT'S BECAUSE THESE ARE REALLY, REALLY BIG DECISIONS,

1 AND TOMORROWNOW OFFERING HALF PRICE SUPPORT FOR THIS INTERIM  
2 TRANSITION PERIOD ON YOUR OLD PEOPLESFT SOFTWARE IS NOT A GOOD  
3 ENOUGH REASON FOR PEOPLE TO SWITCH.

4 THAT'S WHAT HE'S SAYING.

5 OKAY. LET ME GIVE YOU AN EXAMPLE OF A CUSTOMER.  
6 THIS CUSTOMER IS LEXMARK. IT'S A BIG MAKER OF PRINTERS. AND  
7 LEXMARK WAS TRYING TO DECIDE WHETHER TO STAY WITH PEOPLESFT OR  
8 TO SWITCH TO SAP OR SOMEBODY ELSE.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 **MR. MITTELSTAEDT:** AND AS YOU CAN IMAGINE FOR A BIG  
11 CORPORATION, THEY HAD A VERY SYSTEMATIC WAY OF GOING ABOUT THIS.  
12 AND HERE'S WHAT MR. O'DONNELL SAID.

13 "Q. WHAT FACTORS INFLUENCED YOUR DECISION  
14 TO GO TO SAP?"

15 AND HIS ANSWER WAS, "THERE WERE OVER 300  
16 DATAPOINTS THAT WERE MEASURED AND SCORED," SO 300  
17 ISSUES.

18 "Q. WERE THOSE SAME 300 DATAPOINTS MEASURED  
19 AND SCORED FOR ORACLE?

20 "A. YES.

21 "Q. SO THEY COMPARED HOW ORACLE AND SAP DID  
22 SAP SCORED HIGHER ON THOSE 300 DATAPOINTS?

23 "A. YES."

24 **MR. MITTELSTAEDT:** AND THEN HE WAS ASKED, "WHEN  
25 SELECTING SAP, WHAT ROLE, IF ANY, DID THE EXISTENCE OF

1 TOMORROWNOW HAVE TO DO WITH LEXMARK'S DECISION TO TRANSITION TO  
2 SAP?"

3 "A. AND HIS ANSWER WAS, NOTHING TO MY  
4 KNOWLEDGE.

5 "NOT A POSITIVE, NOT A NEGATIVE?" WAS THE  
6 QUESTION.

7 AND HIS ANSWER WAS, "IT," REFERRING TO TOMORROWNOW,  
8 "WAS NOT A DATAPOINT."

9 **MR. MITTELSTAEDT:** SO OUT OF THE 300 FACTORS THAT  
10 THIS CUSTOMER CONSIDERED IN SWITCHING FROM ORACLE TO TOMORROW --  
11 EXCUSE ME -- FROM ORACLE TO SAP FOR SOFTWARE, TOMORROWNOW WAS  
12 NOT ONE OF THOSE DATAPOINTS.

13 SO THIS IS CLEARLY A CUSTOMER WHERE WE DON'T HAVE TO  
14 GIVE OUR PROFITS, OUR REVENUES, ON THIS CUSTOMER TO ORACLE  
15 BECAUSE TOMORROWNOW DIDN'T HAVE ANYTHING TO DO WITH IT.

16 ANOTHER CUSTOMER YOU'LL HEAR ABOUT IS AMGEN, THE BIG  
17 BIOTECHNICAL COMPANY, AND HERE ARE SOME INTERNAL EMAILS FROM  
18 ORACLE.

19 (DEMONSTRATIVE PUBLISHED TO JURY.)

20 **MR. MITTELSTAEDT:** AMGEN WAS ALSO MAKING THE SAME  
21 DECISION THAT LEXMARK WAS MAKING, SHOULD WE SWITCH FROM ORACLE  
22 TO SAP OR SOMEBODY ELSE.

23 AND SO THE QUESTION HERE IS, WHEN AMGEN WAS  
24 SWITCHING, DID THEY SWITCH BECAUSE SAP HAD BETTER SOFTWARE, DID  
25 THEY SWITCH BECAUSE THEY WERE DISSATISFIED WITH ORACLE SOFTWARE,

1 OR DID THEY SWITCH BECAUSE OF TOMORROWNOW?

2 AND HERE'S WHAT ORACLE'S INTERNAL DOCUMENTS SAY.

3 THIS ONE AT THE VERY TOP, MR. PHILLIPS TO MR. ELLISON, AND THIS  
4 IS THREE MONTHS INTO TOMORROWNOW AND INTO PEOPLESOFT.

5 MR. PHILLIPS SAYS TO MR. ELLISON, "I KNOW YOU'VE  
6 SPOKEN WITH THE AMGEN C.E.O., BUT THE AMGEN C.I.O.," THE CHIEF  
7 INTELLECTUAL OFFICER, "AND HIS NUMBER TWO ARE NOT BIG FANS OF  
8 OURS. SO I'M WORKING ON IT FROM THIS END."

9 "WE BUNGLED THE DEMONSTRATION LAST MONTH." SO IF  
10 ORACLE BUNGLED THE DEMONSTRATION OF THEIR PRODUCT, THEY CAN'T  
11 BLAME US FOR THE FACT THAT THE CUSTOMER CHOSE US.

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 **MR. MITTELSTAEDT:** HERE'S ANOTHER EMAIL. ACTUALLY,  
14 THIS IS THE -- AN INTERNAL PROPOSAL DOCUMENT AT -- AT ORACLE,  
15 AND THEY SAY AMGEN HAS ALREADY PURCHASED SAP SOFTWARE TO REPLACE  
16 THEIR JDE SOFTWARE. SO THIS IS ANOTHER COMPANY WHEN ORACLE  
17 TAKES OVER PEOPLESOFT, TAKEN OVER JDE, THE CUSTOMER DECIDES TO  
18 SWITCH TO SAP. AND THEY MADE THE DECISION BEFORE EVER GOING TO  
19 TOMORROWNOW, SO TOMORROWNOW HAD NOTHING TO DO WITH THE  
20 DECISION -- THIS DECISION, BUT ORACLE STILL WANTS US TO  
21 COMPENSATE THEM FOR THE REVENUES FOR THIS CUSTOMER.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 **MR. MITTELSTAEDT:** HERE'S ANOTHER DOCUMENT STILL  
24 ABOUT AMGEN, AND IT'S TALKING ABOUT ONE OF THE EXECUTIVES AT  
25 AMGEN. AND IT SAYS HE DOES NOT LIKE LARRY, REFERRING TO

1 ELLISON. AMGEN IS MARCHING TO AN SAP DECISION ON APRIL 22.

2 AND THEN THE FINAL DOCUMENT ON AMGEN THAT I'LL SHOW  
3 YOU AT THIS POINT --

4 (DEMONSTRATIVE PUBLISHED TO JURY.)

5 **MR. MITTELSTAEDT:** -- IS ANOTHER INTERNAL DOCUMENT AT  
6 ORACLE AGAIN BY MR. PHILLIPS, AND HE WRITES, "THE JDE  
7 RELATIONSHIP WITH AMGEN DUE TO THE PEOPLESFT ACQUISITION WAS  
8 NOT GOOD. THEY BELIEVE SERVICE HAS DROPPED OFF DUE TO THE  
9 ACQUISITION. SAP HAS BEEN ALL OVER THIS ACCOUNT TOUTING  
10 ORACLE'S LACK OF FOCUS AND DISTRACTION DUE TO THE PS" --  
11 "PEOPLESFT ACQUISITION AND PROJECT FUSION."

12 SO AMGEN DECIDES TO GO TO SAP BASED ON COMPETITION,  
13 NOT BASED ON ANYTHING TOMORROWNOW DID.

14 ACTUALLY, LET ME GET A GLASS OF WATER, AND THEN I  
15 WANT TO TURN TO ANOTHER ISSUE. EXCUSE ME.

16 (PAUSE IN THE PROCEEDINGS.)

17 **MR. MITTELSTAEDT:** NOW, YOU'VE HEARD ORACLE'S LAWYER  
18 SAY THAT SAP EXPECTED ALL THESE CUSTOMERS TO COME TO SAP, AND HE  
19 SHOWED YOU A BUNCH OF DOCUMENTS. WHAT HE IMPLIED WAS THAT ALL  
20 THOSE CUSTOMERS -- I THINK IT WAS 50 PERCENT IN ONE OF THE  
21 DOCUMENTS -- THAT SAP THOUGHT THEY WERE GOING TO COME TO SAP AND  
22 LEAVE ORACLE JUST BECAUSE OF TOMORROWNOW.

23 WHEN YOU LOOK AT THOSE DOCUMENTS, YOU'LL SEE  
24 TOMORROWNOW IS A SMALL PART OF THAT. SAP HAD THIS PROGRAM  
25 CALLED SAFE PASSAGE, AND THEY PUT IT INTO EFFECT AFTER ORACLE

1 TAKES OVER PEOPLESOFT. AND THE IDEA WAS TO GIVE THESE CUSTOMERS  
2 A SAFE PASSAGE TO SAP WHERE THEY WOULDN'T HAVE TO WORRY ABOUT  
3 WHAT ORACLE WAS GOING TO DO WITH PEOPLESOFT SOFTWARE. THE  
4 DOCUMENTS THAT THEY WERE SHOWING YOU ARE SAFE PASSAGE DOCUMENTS.

5 AND MR. MCDERMOTT, WHEN HE TESTIFIES, WILL EXPLAIN  
6 SAFE PASSAGE TO YOU AND HOW THIS WORKED. IN A NUTSHELL, THE  
7 HEART OF SAFE PASSAGE WAS THAT SAP'S GOT REAL GOOD SOFTWARE.  
8 AND WE THINK OUR SOFTWARE FITS YOUR BUSINESS PURPOSES BETTER  
9 THAN PEOPLESOFT, BETTER THAN ORACLE.

10 WHEN ORACLE ANNOUNCED THAT IT WAS TAKING OVER  
11 PEOPLESOFT, IT BASICALLY SAID WE'RE GOING TO FUSE TOGETHER ALL  
12 OF THE SOFTWARE, THE PEOPLESOFT SOFTWARE, THE JD EDWARDS  
13 SOFTWARE, AND THE ORACLE SOFTWARE, AND WE'LL COME UP EVENTUALLY  
14 WITH THIS NEW SOFTWARE, AND THEY CALLED IT PROJECT FUSION.

15 AND SOME CUSTOMERS HAD SOME DOUBTS WHETHER PROJECT  
16 FUSION WAS EVER GOING TO COME ABOUT, WHETHER ORACLE COULD REALLY  
17 PUT TOGETHER ALL THESE DIFFERENT SOFTWARES AND HOW IT WAS GOING  
18 TO TURN OUT AND WHAT IT WOULD MEAN FOR THE CUSTOMERS. AND SO  
19 WHAT MR. PHILLIPS IS RECOGNIZING HERE IS THAT --

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 **MR. MITTELSTAEDT:** -- SAP HAS BEEN SAYING THAT  
22 THERE'S A LACK OF FOCUS BY ORACLE, AND THERE'S A DISTRACTION DUE  
23 TO PROJECT FUSION. CUSTOMERS WERE CONFUSED ABOUT WHAT ORACLE  
24 WAS GOING TO DO.

25 AND MR. MCDERMOTT, AS I SAY, WILL EXPLAIN HOW THIS



1 WORKED AND THAT IN -- IN THE VIEW OF SAP, THE MOST IMPORTANT  
2 PART, THE MOST IMPORTANT WAY WE WERE GOING TO GET CUSTOMERS AWAY  
3 FROM ORACLE WAS BECAUSE OF OUR SOFTWARE. AND TOMORROWNOW WAS A  
4 VERY, VERY SMALL PART OF IT.

5 ONE OF THE DOCUMENTS THEY SHOWED YOU WAS THIS DRAFT  
6 PRESENTATION TO THE BOARD, AND IT TALKED ABOUT OFFERING FULL  
7 MAINTENANCE, AND THEN -- AND HE READ THE FIRST PART BY OFFERING  
8 FULL MAINTENANCE AND SUPPORT, MIGRATION TOOLS, SAP WILL SIPHON  
9 OFF CASH FLOW.

10 WHAT HE LEFT OUT WHEN HE READ IT WAS "MY SAP ERP."  
11 THAT'S SAP SOFTWARE. AND AS MR. MCDERMOTT WILL EXPLAIN, THAT  
12 WAS THE HEART OF THE COMPETITIVE EFFORTS. THAT SOFTWARE. SAP'S  
13 PRODUCT WAS THE HEART OF THE -- OF THE EFFORT TO ATTRACT ORACLE  
14 CUSTOMERS WHO WERE CONCERNED ABOUT -- ABOUT ALL OF THIS.

15 OKAY. SO YOU'VE HEARD FROM -- FROM CUSTOMERS. YOU  
16 HEARD FROM ORACLE. LET ME GIVE YOU ONE MORE -- OR COUPLE MORE  
17 DOCUMENTS FROM ORACLE ON WHY CUSTOMERS WERE LEAVING.

18 (DEMONSTRATIVE PUBLISHED TO JURY.)

19 **MR. MITTELSTAEDT:** THIS IS A DOCUMENT -- THESE ARE  
20 TWO EMAILS. AND THE ONE AT THE TOP IS FROM MR. HENLEY, WHO'S  
21 THE CHAIRMAN OF THE BOARD OF ORACLE, TO MS. CATZ, WHO YOU'VE  
22 BEEN INTRODUCED TO AND WHO WILL BE A WITNESS IN THIS CASE. AND  
23 THEN THE QUOTE IN THE MIDDLE OF THE PAGE IS WHAT MS. CATZ IS  
24 TELLING MR. HENLEY.

25 AND WHAT SHE SAYS THREE MONTHS INTO THE ACQUISITION

1 IS, "I DON'T BELIEVE WE HAVE LOST ANY LARGE CUSTOMERS BECAUSE OF  
2 THIS," REFERRING TO TOMORROWNOW.

3 "IF WE LOST, WE LOST TO SAP FOR OTHER REASONS."

4 THAT'S AN ACKNOWLEDGMENT THAT WHEN THEY LOST  
5 CUSTOMERS, WHEN ORACLE LOST CUSTOMERS TO SAP, THEY LOST THEM, IN  
6 MS. CATZ'S VIEW, FOR REASONS OTHER THAN TOMORROWNOW. AND IT'S  
7 THE KIND OF REASON THAT WE'VE BEEN TALKING ABOUT.

8 YET, THEY WANT US TO PAY THEM FOR ALL THESE OTHER  
9 CUSTOMERS THEY LEFT (SIC) FOR REASONS -- THAT THEY LOST FOR  
10 REASONS UNRELATED TO TOMORROWNOW.

11 NOW, THEY CHALLENGED ME TO ANSWER A QUESTION IN THEIR  
12 OPENING, AND THEY SAID, WELL, WHAT DOES THIS MATTER IF MS. CATZ  
13 DIDN'T KNOW THAT TOMORROWNOW WAS DOING ILLEGAL THINGS?

14 WELL, THE ANSWER TO THAT IS THIS DOESN'T HAVE  
15 ANYTHING TO DO WITH WHAT TOMORROWNOW IS DOING. SHE IS  
16 ACKNOWLEDGING WE LOST TO SAP FOR REASONS OTHER THAN TOMORROWNOW.

17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 **MR. MITTELSTAEDT:** MR. JONES, AGAIN ON THE SAME  
19 SUBJECT. YOU KNOW, HOW BIG A THREAT WAS TOMORROWNOW IN TAKING  
20 CUSTOMERS FROM ORACLE AND HAVING THEM MIGRATE TO SAP? THIS IS  
21 WHAT MR. JONES SAYS, AND THIS IS ALMOST, WHAT, A YEAR AND A HALF  
22 AFTER THE ACQUISITION.

23 "IF TOMORROWNOW IS GOING TO WIN A BUNCH OF  
24 MAINTENANCE-ONLY CUSTOMERS WITH NO PLANS TO UPGRADE FOR FIVE  
25 YEARS, SUCH AS ONE CUSTOMER, I DON'T THINK TOMORROWNOW WILL BE

1 TOO LONG FOR THIS WORLD AS SAP WON'T MAKE PROFITABLE MONEY ON  
2 THESE CUSTOMERS IF THEY CAN'T GET THEM TO IMPLEMENT SAP."

3 "LJE," A REFERENCE TO MR. ELLISON, "TOOK NOTE OF THIS  
4 A LONG TIME AGO."

5 SO, AGAIN, THEY'RE RECOGNIZING THAT TOMORROWNOW IS  
6 NOT A THREAT AND NOT A THREAT FOR CONVERTING CUSTOMERS TO SAP.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 **MR. MITTELSTAEDT:** THIS MAY BE THE LAST ONE FOR  
9 MR. JONES I SHOW YOU, BUT I THINK IT REALLY GETS TO THE HEART OF  
10 THE POINT.

11 MR. JONES IS SAYING -- AND THIS IS IN A INTERNAL  
12 EMAIL AT ORACLE, FINALLY LET'S GET SERIOUS AND TALKING ABOUT  
13 SWITCHING APPS, APPLICATIONS SUPPLIERS.

14 SAFE PASSAGE. SAFE PASSAGE WAS SAP'S PROGRAM TO  
15 SWITCH CUSTOMERS. WHAT DID MR. JONES THINK ABOUT THAT? "I GOT  
16 TO HAND ONE TO THEIR MARKETING TEAM. SAFE PASSAGE, IT'S ALMOST  
17 AS GOOD AS NO CHILD LEFT BEHIND, CLEAR SKIES, THE PATRIOT ACT."  
18 HE'S MAKING A JOKE OUT OF IT.

19 AND THEN HE SAYS, I OFTEN HEAR THE FOLLOWING SILLY  
20 ARGUMENT. TOMORROWNOW TOLD CUSTOMERS THEY'LL GIVE THEM --  
21 THEY'LL SAVE THEM A LOT OF MONEY, AND THE CUSTOMER CAN BANK THAT  
22 MONEY AND THEN USE THE ACCUMULATION TO PAY FOR SAP.

23 SO THAT WAS THE IDEA HOW -- WHY PEOPLE WOULD GO TO  
24 TOMORROWNOW, SAVE SOME MONEY AND THEN HAVE ENOUGH MONEY TO  
25 SWITCH FROM ORACLE TO SAP. SAY WHAT? THAT'S WHAT MR. JONES

1 SAYS. AND THEN HE CALLS IT -- "THIS IS THE SILLIEST ARGUMENT  
2 I'VE EVER HEARD."

3 WELL, NOW, THAT BASICALLY IS THE ARGUMENT THAT ORACLE  
4 IS ADOPTING.

5 ORACLE IS CLAIMING THAT WHEN ORACLE CUSTOMERS SWITCH  
6 TO SAP, IT MUST HAVE BEEN BECAUSE OF TOMORROWNOW AND SO WE OWE  
7 THEM OUR PROFITS ON ALL THOSE CUSTOMERS. THAT WAS A SILLY  
8 ARGUMENT WHEN MR. JONES WAS REFERRING TO IT, AND IT'S AN  
9 ARGUMENT THAT DOESN'T HOLD ANY WATER TODAY.

10 (CONTINUED NEXT PAGE, NOTHING OMITTED.)

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## OPENING STATEMENT - MR. MITTELSTAEDT

1           **MR. MITTELSTAEDT:** SO, THAT'S A SUMMARY OF WHERE WE  
2 ARE ON THE SECOND CATEGORY OF CUSTOMERS. SOFTWARE CUSTOMERS  
3 THAT WENT TO SAP BECAUSE OF TOMORROWNOW OR WENT TO SAP FOR  
4 OTHER REASONS.

5           THERE WERE A TOTAL OF -- AND YOU WILL HEAR THIS  
6 EVIDENCE -- A TOTAL OF 86 CUSTOMERS. SO WE START WITH -- IF I  
7 CAN APPROACH THE EASEL, AGAIN, YOUR HONOR?

8           **THE COURT:** CERTAINLY.

9           **MR. MITTELSTAEDT:** WE START WITH 9,922, I THINK IT  
10 WAS, PEOPLESOFT CUSTOMERS THAT WERE ACQUIRED BY ORACLE. AND OF  
11 THOSE 358 WENT TO TOMORROWNOW. AND OF THOSE, 86 BOUGHT SAP  
12 SOFTWARE.

13           AND SO THE QUESTION -- AND I HAVE ALREADY TALKED  
14 ABOUT THE 358 OUT OF THOSE 200 OR SO WENT TO TOMORROWNOW, WOULD  
15 NOT HAVE LEFT ORACLE OTHERWISE SO WE OWE THEM FOR THAT. OF  
16 THESE 86, NOW THE QUESTION IS HOW MUCH DO WE OWE THEM FOR  
17 THOSE.

18           OUR ACCOUNTANT HAS BEEN ABLE TO SHOW THAT OF THOSE  
19 86, THERE IS EVIDENCE THAT SHOWS 84 OF THEM WERE GOING TO LEAVE  
20 ORACLE ANYWAY. THEY WERE GOING TO BUY SAP SOFTWARE, AND THEIR  
21 PURCHASE DECISION HAD NOTHING TO DO WITH TOMORROWNOW. THERE'S  
22 TWO WHERE THE EVIDENCE IS INSUFFICIENT.

23           SO WE SAY WE WILL GIVE THE BENEFIT OF THE DOUBT TO  
24 ORACLE AND WE OWE THEM OUR PROFITS ON THE TWO CUSTOMERS THAT  
25 BOUGHT SOFTWARE FROM SAP WHERE WE CAN'T DISPROVE THAT

## OPENING STATEMENT - MR. MITTELSTAEDT

1 TOMORROWNOW WAS A FACTOR.

2 SO, WHEN YOU ADD UP -- AND THE PROFITS ON THOSE  
3 2 MILLION -- TWO CUSTOMERS ARE ABOUT \$4 MILLION.

4 SO WHEN YOU ADD UP THE 32 TO \$34 MILLION ON THE, ON  
5 THESE 203 CUSTOMERS, AND YOU ADD 4 MILLION HERE, IT GETS TO BE  
6 ABOUT \$40 MILLION. SO WE SAY IN THOSE TWO CATEGORIES OF  
7 CUSTOMERS, WE OWE ORACLE ABOUT \$40 MILLION.

8 AS I SAID, THEIR EXPERT HAS GONE THROUGH THE SAME  
9 CALCULATIONS. HE PUTS MORE CUSTOMERS IN EACH OF THOSE POTS AND  
10 DOES SOME OTHER THINGS. AND HIS NUMBER FOR THOSE CUSTOMERS IS  
11 ABOUT 400 MILLION. SO WE ARE AT 40 MILLION, THEY ARE AT  
12 400 MILLION, USING THIS APPROACH. AND YOU WILL HEAR EVIDENCE  
13 ABOUT WHICH CUSTOMERS SHOULD BE IN WHICH POT AND YOU CAN SEE  
14 WHICH EXPERT YOU AGREE WITH.

15 FINALLY, LET ME TURN TO THE WAY ORACLE IS TRYING TO  
16 GET EVEN MORE MONEY OUT OF THIS. AS YOU'VE HEARD, AS THEY HAVE  
17 SUGGESTED, THEY HAVEN'T REALLY SAID WHAT NUMBER THEY ARE  
18 TALKING ABOUT, BUT THEY ARE ASKING FOR A MUCH, MUCH BIGGER  
19 NUMBER. AND THEY ARE TRYING TO DO IT IN TWO WAYS.

20 ONE, THEY ADD SOME MORE CUSTOMERS TO THESE POTS.  
21 THAT GETS THEM TO THEIR 400 MILLION. THE WAY THEY FOCUSED ON  
22 IT TODAY WAS WHAT IS CALLED A HYPOTHETICAL LICENSE. THEY ARE  
23 TALKING ABOUT, YOU KNOW, IF ORACLE HAD SAT DOWN WITH  
24 TOMORROWNOW OR SAT DOWN WITH SAP IN 2005, WHAT AGREEMENT WOULD  
25 THEY HAVE REACHED.

## OPENING STATEMENT - MR. MITTELSTAEDT

1 I THINK THE EVIDENCE WILL SHOW YOU TO SAY THAT THERE  
2 WOULD HAVE BEEN ANY AGREEMENT BETWEEN THESE TWO COMPETITORS IS  
3 HIGHLY, HIGHLY NOT JUST HYPOTHETICAL, BUT SPECULATIVE THAT  
4 THESE TWO COMPANIES WOULD HAVE AGREED ON A NUMBER.

5 SO, THEY ARE ASKING YOU TO THINK ABOUT WHAT WOULD  
6 HAPPEN IF THERE HAD BEEN THIS IMAGINARY DISCUSSION ABOUT HOW  
7 MUCH WOULD YOU CHARGE US FOR A LICENSE TO DO WHAT TOMORROWNOW  
8 DID.

9 AND WHAT THEY SAY IS THAT THEY WOULD HAVE ASKED FOR  
10 A REALLY BIG NUMBER. IN THE BILLIONS. AND I WILL JUST TELL  
11 YOU, THEIR EXPERT SAYS 2 BILLION. I DON'T KNOW WHY THEY DIDN'T  
12 MENTION IT, BUT THEIR EXPERT SAYS IT IS 2 BILLION.

13 WHAT THEY ARE SAYING IS THEY WOULD HAVE ASKED FOR  
14 \$2 BILLION BECAUSE THEY SUPPOSEDLY THOUGHT A REALLY LARGE  
15 PERCENTAGE OF THEIR PEOPLESOFT CUSTOMERS WERE GOING TO GO TO  
16 TOMORROWNOW AND THEN TO SAP. SO THEY WOULD HAVE DEMANDED A LOT  
17 OF MONEY.

18 THERE'S A COUPLE OF THINGS WRONG WITH THAT. ONE IS,  
19 WE KNOW WHAT HAPPENED. NO MATTER WHAT PEOPLE WERE WRITING IN  
20 DOCUMENTS, NO MATTER WHAT PEOPLE WERE HOPING, NO MATTER WHAT  
21 PEOPLE WERE HYPING, THE REALITY IS THE 358 AND THE 86. SO WE  
22 KNOW WHAT HAPPENED.

23 BUT ALSO, AT THE TIME ORACLE EXECUTIVES DID NOT SEE  
24 A BIG THREAT FROM TOMORROWNOW. AND SO WHEN THEY COME IN AND  
25 TESTIFY WE WOULD HAVE ASKED FOR BILLIONS BECAUSE TOMORROWNOW

## OPENING STATEMENT – MR. MITTELSTAEDT

1 WAS GOING TO TAKE ALL OUR BUSINESS, REMEMBER THIS: AGAIN, THIS  
2 IS MS. CATZ TO MR. HENLEY. IF WE LOST, WE LOST SAP FOR OTHER  
3 REASONS.

4 AND I DIDN'T SHOW YOU THIS ONE, WHICH IS MR. HENLEY,  
5 THE CHAIRMAN OF THE BOARD'S RESPONSE. HIS RESPONSE IS, I THINK  
6 THERE MAY BE SOME LOSSES EVENTUALLY WHEN SAP CONVINCES SOME SAP  
7 CUSTOMERS TO SWITCH FROM PEOPLESFT TO SAP RATHER THAN  
8 UPGRADING, BUT OUR MODEL ALWAYS ASSUMED THERE WOULD BE SOME  
9 ATTRITION IS THE WORD LEFT OFF. AND THEN HE SAYS, BUT I THINK  
10 OUR CUSTOMERS, THEY'LL, THEY'LL GIVE US TIME TO SHOW WHAT WE  
11 CAN DO OR WE WILL DO AS WE SAY, MEANING BRING OUR FUSION  
12 SOMETIME, AND YOU WILL HEAR TESTIMONY ABOUT THE STATE OF  
13 CONFUSION, BUT OUR CUSTOMERS WILL GIVE US TIME BEFORE DECIDING  
14 WHETHER TO SWITCH TO SAP OR UPGRADE TO ORACLE.

15 SO, IN THEIR VIEW, AT LEAST, NO BIG DEAL, NO REAL  
16 THREAT. AND THEN IT GOES ON: THIS IS THE NEXT YEAR. ONE OF  
17 THE ORACLE PEOPLE SAY, IF WE PRESENT A STRONG CASE FOR WHY  
18 CUSTOMERS SHOULD CONTINUE TO CHOOSE ORACLE SOFTWARE AND TO  
19 UPGRADE TO NEWER VERSIONS, TOMORROWNOW IS IRRELEVANT.

20 NOT THE BIGGEST THREAT IN THE WORLD, NOT SOMEBODY WE  
21 ARE GOING TO DEMAND \$2 BILLION TO HAVE A LICENSE, IRRELEVANT.

22 SO, THESE ARE NOT THE WORDS OF A COMPANY THAT HAD  
23 HIGH EXPECTATIONS THAT TOMORROWNOW WAS GOING TO TAKE AWAY A LOT  
24 OF VALUABLE BUSINESS.

25 DURING THIS TRIAL, YOU WILL BE ABLE TO CONTRAST WHAT



## OPENING STATEMENT - MR. MITTELSTAEDT

1       THEY WERE SAYING AT THE TIME WITH WHAT THEY ARE SAYING NOW.  
2       AND THE REALITY IS, DESPITE THE HOPES AND THE ASPIRATIONS THAT  
3       YOU WILL SEE IN SOME OF THE SAP DOCUMENTS, THE REALITY IS THAT  
4       TOMORROWNOW WAS VALUED AT \$10 MILLION. THAT'S WHAT SAP PAID  
5       FOR IT, AND TOMORROWNOW WAS NOT SUCCESSFUL. IT HAD 358  
6       CUSTOMERS BEFORE WE SHUT IT DOWN, AND IT LOST MONEY HAND OVER  
7       FIST, AND THESE 358 WERE ONLY ABOUT 3 PERCENT OF THE PEOPLESOFT  
8       DOCUMENTS.

9               SO, YES, YOU WILL HEAR SOME PEOPLE AT SAP THOUGHT  
10       SAFE PASSAGE, WHICH TOMORROWNOW IS A SMALL PART, WAS GOING TO  
11       BE WILDLY SUCCESSFUL. YOU WILL EVEN HEAR ONE PERSON WHO SAID,  
12       HE HOPED WE WOULD GET -- I THINK IT WAS 60 PERCENT OF  
13       PEOPLESOFT CUSTOMERS.

14              BUT NONE OF THAT MARKETING HYPE, IF I CAN CALL IT  
15       THAT, WAS MADE IN THE CONTEXT OF LET'S SIT DOWN AND HAVE A  
16       NEGOTIATION WITH ORACLE AND THE TYPE OF RIGOROUS ANALYSIS THAT  
17       A COMPANY WOULD GO THROUGH IN DECIDING WHETHER TO SPEND THE  
18       KIND OF MONEY THAT ORACLE IS SAYING IT WOULD DEMAND.

19              LET ME MENTION ONE OTHER THING. THEY SHOWED YOU A  
20       COUPLE OF DOCUMENTS AND SHOWED YOU SOME DEPOSITION TESTIMONY  
21       THAT LOOKS BAD. I THINK THE TESTIMONY OF MR. RITCHIE TALKING  
22       ABOUT NOT PUTTING STUFF IN WRITING, AND THE KINDS OF THINGS HE  
23       TALKED ABOUT. YOU KNOW, THAT'S BAD STUFF.

24              BUT ASK YOURSELF THIS QUESTION AS YOU HEAR EVIDENCE  
25       LIKE THAT: HOW MUCH OF THAT GOES TO THE AMOUNT TO -- HOW MUCH

## OPENING STATEMENT - MR. MITTELSTAEDT

1 OF THAT HELPS YOU DETERMINE THE AMOUNT OF COMPENSATION THAT  
2 ORACLE IS ENTITLED TO?

3 THIS CASE IS NOT ABOUT PUNISHMENT. THIS CASE IS  
4 ABOUT COMPENSATION. WHAT DO WE OWE ORACLE? AND WHETHER  
5 MR. RITCHIE SAID THE KIND OF THINGS HE SAID OR NOT, DOESN'T GO  
6 TO COMPENSATION. WHETHER HE SAID IT OR NOT, IT DOESN'T MEAN  
7 ONE MORE CUSTOMER THAN THE 358 WENT FROM PEOPLESOFT TO  
8 TOMORROWNOW. IT DOESN'T MEAN THAT SAP SOLD A SINGLE MORE  
9 CUSTOMER SAP SOFTWARE. IT JUST IS INTENDED TO INFLAME YOU AND  
10 TO TAKE YOUR MIND AWAY FROM THE ONLY ISSUE AT HAND.

11 I AM SAYING THAT NOT TO EXCUSE THE CONDUCT. I AM  
12 NOT EXCUSING ANYBODY'S CONDUCT. BUT I AM SAYING KEEP YOUR EYE  
13 ON THE BALL. AND THE BALL HERE IS IN A CALM, DETACHED WAY  
14 SEPARATED FROM THE EMOTION -- SOME OF THIS STUFF IS GOING TO  
15 RILE UP -- IN A CALM, DETACHED WAY, HOW MANY CUSTOMERS ARE AT  
16 ISSUE HERE? HOW MANY CUSTOMERS LEFT ORACLE BECAUSE OF  
17 TOMORROWNOW? HOW MANY CUSTOMERS CAME TO SAP BECAUSE OF  
18 TOMORROWNOW? FOR THOSE CUSTOMERS, WE OWE THEM PROFITS AND WE  
19 HAVE BEEN WILLING TO PAY THOSE PROFITS TO THEM AND WE CONTINUE  
20 TO BE WILLING TO PAY THOSE PROFITS.

21 ANOTHER INFLAMMATORY KIND OF THING WAS THIS DOCUMENT  
22 THEY SHOWED YOU ABOUT -- WITH A LOT OF FANFARE AND SO FORTH.  
23 SAP WILL LEAVE TEXAS CORPORATION IN EXISTENCE AS A LIABILITY  
24 SHIELD FOR ANY POTENTIAL CLAIMS.

25 FOR THOSE OF YOU WHO HAVE WORKED WITH CORPORATIONS,

## OPENING STATEMENT - MR. MITTELSTAEDT

1 THE REASON CORPORATIONS HAVE SUBSIDIARIES IS EXACTLY THIS.  
2 IT'S THE SAME THING WITH CORPORATIONS AND PRIVATE SHAREHOLDERS.  
3 THE CORPORATION GETS SUED, THE SHAREHOLDER DOESN'T GET SUED.  
4 THAT'S THE WAY IT'S SET UP IN AMERICA. THAT'S PART OF OUR  
5 GREAT SYSTEM OF ECONOMY, AND YOU SUE THE COMPANY WHO DID  
6 SOMETHING WRONG.

7 WE ARE NOT STANDING BEHIND THIS. AND AS I SAID, SAP  
8 IS HERE ADMITTING RESPONSIBILITY, TAKING RESPONSIBILITY. WE  
9 ARE NOT SAYING TOMORROWNOW OUGHT TO PAY THIS, WE SHOULDN'T PAY  
10 IT. IT'S GOING TO BE PAID WHATEVER WE OWE THEM UNDER THE LAW.

11 SO WHY DID THEY SHOW YOU THIS? THEY SHOW YOU THIS  
12 BECAUSE OF WHAT THEY SAID IS -- THE FACT THAT WE ARE GOING TO  
13 LEAVE THE TEXAS CORPORATION IN EXISTENCE, THAT SHOWS THE  
14 ENORMOUS VALUE WE PUT ON THE SOFTWARE. THAT DOESN'T MAKE ANY  
15 SENSE. WE LEFT IT IN PLACE WHETHER THE EXPOSURE WAS ENORMOUS  
16 OR A LITTLE. THAT ARGUMENT DOESN'T GO ANYWHERE.

17 THEY ALSO SAY, THEY SAY SAP CHOSE TO DO THIS BECAUSE  
18 IT KNEW THAT IT WOULD COST BILLIONS OF DOLLARS TO BUY THE  
19 LICENSE AND, THEREFORE, THAT SHOWS THE BIG, THE BIG VALUE OF  
20 THIS. THAT IS A CIRCULAR ARGUMENT.

21 THE ONLY REASON THE LICENSE WOULD BE WORTH A BILLION  
22 DOLLARS IS BECAUSE THEY SAY NOW THAT'S WHAT IT WOULD BE WORTH.  
23 THEY ARE SAYING BECAUSE THEY SAY THEY WANT A BILLION DOLLARS  
24 FROM US, THEREFORE, THE VALUE OF THIS IS A BILLION DOLLARS.  
25 THAT DOESN'T MAKE SENSE. IT'S CIRCULAR.

## OPENING STATEMENT - MR. MITTELSTAEDT

1           HERE'S MY LAST POINT ON THIS HYPOTHETICAL LICENSE.  
2           OUR ACCOUNTANT, STEVE CLARK, WILL PROBABLY BE THE LAST WITNESS  
3           YOU HEAR. IT'S JUST THE WAY IT'S SET UP. WE GO LAST AND  
4           EXPERTS ARE USUALLY THE LAST WITNESS IN THE LINEUP. SO I ASK  
5           YOU TO KEEP AN OPEN MIND UNTIL YOU HEAR MR. CLARK.

6           AND WHAT MR. CLARK WILL TELL YOU ON THIS  
7           HYPOTHETICAL LICENSE IS IF YOU GET PASSED THE PROBLEM OF  
8           THINKING ABOUT THESE TWO CUSTOMERS EVER SITTING DOWN AND  
9           NEGOTIATING IN THIS IMAGINARY SETUP, AND HAVING ORACLE SAY WE  
10          WANT BILLIONS AND SAP SAYING WELL, WE ONLY PAID \$10 MILLION FOR  
11          THIS COMPANY, WHY WOULD WE PAY \$2 BILLION NOW TO RUN THE  
12          COMPANY, BUT IF YOU GET PASSED THAT AND YOU THINK THESE  
13          COMPANIES COULD COME TO A MEETING OF THE MINDS, THE ONLY WAY IT  
14          WOULD MAKE SENSE, ACTUALLY, ONLY WAY IT WOULD MAKE SENSE IS  
15          SOMETHING CALLED A RUNNING ROYALTY.

16          THERE IS TWO WAYS TO HAVE A LICENSE AGREEMENT. ONE  
17          IS A RUNNING ROYALTY WHERE YOU HAVE SOME KIND OF MEASUREMENT  
18          AND YOU SAY WE WILL GIVE YOU X PERCENT OF YOUR SALES FOR THIS  
19          YEAR. OR YOU CAN HAVE A PAID UP FRONT LICENSE WHERE YOU KNOW  
20          WHAT THE VALUE IS GOING TO BE AND YOU SAY, OKAY, WE WILL GIVE  
21          YOU A LUMP SUM NOW AND WE CAN USE THE PRODUCT FOREVER.

22          IN THIS KIND OF SETUP, NOBODY KNEW WHAT THE VALUE OF  
23          TOMORROWNOW WAS GOING TO BE. YOU WILL SEE A LOT OF CONFLICTING  
24          THINGS IN THE DOCUMENT, BUT THE IDEA THAT SAP HAVING BOUGHT --  
25          PAID \$10 MILLION FOR THIS COMPANY WOULD THEN TURN AROUND AND

## OPENING STATEMENT - MR. MITTELSTAEDT

1 SAY, OKAY, ORACLE WE WILL GIVE YOU \$10 BILLION ON THE HOPE THAT  
2 THIS WILL REALLY TURN INTO SOMETHING. THAT WOULD NOT HAVE BEEN  
3 A GOOD DEAL. PEOPLE WOULDN'T HAVE DONE THAT.

4 IF THEY WERE GOING TO DO SOME KIND OF DEAL AT ALL,  
5 IT WOULD HAVE BEEN A RUNNING ROYALTY WHERE WE WOULD SAY, OKAY,  
6 LET'S HAVE SOME AGREEMENT. WE WILL GIVE YOU X PERCENT OF OUR  
7 REVENUES OR OF TOMORROWNOW'S REVENUE FROM USING YOUR IP.  
8 SOMETHING LIKE THIS. IT WOULD BE SORT OF A WIN WIN.

9 IF TOMORROWNOW REALLY TOOK OFF, WE WOULD PAY MORE  
10 MONEY TO ORACLE ON A YEARLY BASIS. IF TOMORROWNOW DIDN'T DO  
11 WELL, AS IT ACTUALLY TURNED OUT, WE WOULDN'T PAY MUCH.

12 SO MR. CLARK WILL EXPLAIN IN MORE DETAIL WHY IF THIS  
13 WERE EVER GOING TO HAPPEN, IT WOULD NOT HAVE BEEN BILLIONS OF  
14 DOLLAR UP FRONT. IT WOULD HAVE BEEN A RUNNING ROYALTY. AND  
15 THEN HE WILL ALSO EXPLAIN, IF IT WERE A RUNNING ROYALTY, HOW  
16 WOULD IT TURN OUT. AND GIVEN THE ALMOST COMPLETE LACK OF  
17 SUCCESS OF TOMORROWNOW, THAT AMOUNT OF MONEY, UNDER THE RUNNING  
18 ROYALTY, WOULD NOT BE VERY MUCH.

19 OKAY. IT'S TIME FOR YOU TO START HEARING THE  
20 EVIDENCE. AND AS YOU HEAR THE WITNESSES, I WANT TO ASK YOU TO  
21 KEEP A COUPLE OF THINGS IN MIND.

22 AS HER HONOR HAS TOLD YOU AT THE START OF THE CASE,  
23 THIS CASE IS ABOUT COMPENSATION. WHAT COMPENSATION DO WE OWE  
24 ORACLE FOR THE COPYRIGHT INFRINGEMENT? IT IS NOT ABOUT  
25 PUNISHING US. IT'S NOT ABOUT GETTING ALL RILED UP AND INFLAMED

## OPENING STATEMENT – MR. MITTELSTAEDT

1 UP BY EMOTION. IT'S ABOUT FOCUSING ON COMPENSATION. AND WHEN  
2 YOU HEAR EVIDENCE, I THINK YOU ARE ENTITLED TO ASK YOURSELF, IS  
3 THIS REALLY GOING TO DAMAGES AND COMPENSATION OR IS THIS GOING  
4 TO SOMETHING ELSE. AND I ASK YOU TO FOCUS ON THE COMPENSATION  
5 THAT THEY ARE ENTITLED TO. AND, AGAIN, IT'S THE PROFITS ON  
6 THESE TWO CATEGORIES OF COMPANIES THAT WE HAVE TALKED ABOUT.

7 SO, LET ME END AS I STARTED. WE CONTINUE TO STAND  
8 READY TO COMPENSATE ORACLE TO THE EXTENT IT IS ENTITLED TO  
9 UNDER THE LAW. BUT ORACLE'S NUMBERS ARE NOT JUST HYPOTHETICAL,  
10 AND THEY WOULD ADMIT THAT PART OF IT, BUT I THINK THEY ARE  
11 BASED ON FANTASY. THEY ARE DESIGNED TO GIVE ORACLE A WINDFALL,  
12 A BONANZA THAT IT NEITHER DESERVES NOR IS IT ENTITLED TO.

13 AND WITH THAT I THANK YOU FOR YOUR ATTENTION AND I  
14 LOOK FORWARD TO TALKING WITH YOU AT THE END OF THE CASE WHEN I  
15 WILL HAVE A CHANCE TO GIVE MY VIEW ON WHAT THE EVIDENCE HAS  
16 SHOWN.

17 UNTIL THEN, THANK YOU VERY MUCH.

18 **THE COURT:** ALL RIGHT. THANK YOU, MR. MITTELSTAEDT.

19 MR. HOWARD, ARE YOU READY WITH YOUR FIRST WITNESS?

20 **MR. HOWARD:** YES, YOUR HONOR.

21 **THE COURT:** YOU WANT TO CALL HIM?

22 **MR. HOWARD:** PLAINTIFFS CALL BUFFY RANSOM, YOUR  
23 HONOR.

24 **THE CLERK:** RAISE YOUR RIGHT HAND.

25 ///

RANSOM - DIRECT / MR. HOWARD

**BUFFY RANSOM,**

1 CALLED AS A WITNESS FOR THE PLAINTIFFS, HAVING BEEN DULY SWORN,  
2 TESTIFIED AS FOLLOWS:  
3

4 **THE WITNESS:** I DO.

5 **THE CLERK:** PLEASE STATE YOUR FULL NAME AND SPELL  
6 YOUR LAST NAME FOR THE RECORD.

7 **THE WITNESS:** BUFFY RANSOM, R-A-N-S-O-M.

8 **MR. LANIER:** YOUR HONOR, SCOTT COWAN ON OUR TEAM  
9 WILL BE TALKING WITH MS. RANSOM WHEN IT'S OUR TURN.

10 THANK YOU.

11 **MR. HOWARD:** YOUR HONOR, MAY I APPROACH THE WITNESS  
12 TO PROVIDE HER A WITNESS BINDER?

13 **THE COURT:** YES.

**DIRECT EXAMINATION**

14  
15 **BY MR. HOWARD:**

16 **Q.** GOOD MORNING, MS. RANSOM.

17 BY WHOM ARE YOU EMPLOYED?

18 **A.** ORACLE.

19 **Q.** HOW LONG HAVE YOU BEEN EMPLOYED BY ORACLE?

20 **A.** FOR MORE THAN 17 YEARS NOW.

21 I STARTED AFTER MY MASTER'S DEGREE IN COMPUTER  
22 INFORMATION SYSTEMS, STARTED AT J.D. EDWARDS, WORKED SEVERAL  
23 JOBS IN THE SUPPORT ORGANIZATION WITH J.D. EDWARDS, WAS  
24 ACQUIRED BY PEOPLESOFT IN 2003, AND THEN IN 2005 WAS ACQUIRED  
25 BY ORACLE, AND I HAVE BEEN WITH ORACLE EVER SINCE.

1 Q. DOES ORACLE LICENSE ITS SOFTWARE?

2 A. YES, IT DOES.

3 Q. AND WHEN IT DOES THAT, HOW DOES IT RECEIVE COMPENSATION?

4 A. WE CHARGE AN UP FRONT LICENSE FEE.

5 Q. DO YOU EVER GIVE A CUSTOMER SOFTWARE AND THEN WAIT AND SEE  
6 WHAT HAPPENS BEFORE DECIDING WHAT TO CHARGE?

7 A. NOT TYPICALLY THE STANDARD LINE OF BUSINESS.

8 Q. WHY IS THAT?

9 A. PURCHASING SOFTWARE OR ERP OR APPLICATION SOFTWARE IS A  
10 VERY LARGE DECISION. IT TAKES A LOT OF EFFORT TO MAKE THAT  
11 DECISION. SO IT'S NOT SOMETHING THAT YOU WOULD TAKE LIGHTLY  
12 AND DOWNLOAD FROM A WEBSITE TO IMPLEMENT.

13 Q. ALL RIGHT.

14 NOW, COULD YOU GIVE US A GENERAL OVERVIEW OF THE  
15 VARIOUS ROLES YOU'VE HAD WITH J.D. EDWARDS, AND THEN WITH  
16 PEOPLESOFT AND THEN WITH ORACLE?

17 A. SURE.

18 I WORKED IN THE ENTERPRISE APPLICATION INDUSTRY.  
19 STARTING WITH J.D. EDWARDS, I STARTED AS A SUPPORT CONSULTANT,  
20 WORKED WITH CUSTOMERS OVER THE PHONE. I WAS ON THE TECHNICAL  
21 SIDE OF THE HOUSE, SO I WORKED WITH CUSTOMERS DAYS, NIGHTS AND  
22 WEEKENDS ON THEIR IMPLEMENTATIONS, INSTALLATIONS, CONFIGURING  
23 THEIR SOFTWARE. DID THAT FOR ALMOST 18 MONTHS.

24 AFTER 18 MONTHS I MOVED INTO MANAGEMENT AND MANAGED  
25 THE DIFFERENT SUPPORT ORGANIZATIONS WITHIN J.D. EDWARDS.



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1           WHEN WE WERE ACQUIRED BY PEOPLESOFT IN 2003, I MOVED  
2        INTO A DIRECT LEVEL POSITION MANAGING THE J.D. EDWARDS WORLD  
3        PRODUCT LINE. AND THEN IN 2005 I MANAGED ALL OF THE  
4        J.D. EDWARDS SUPPORT AS WELL.

5        **Q.**     WHAT IS YOUR CURRENT POSITION?

6        **A.**     CURRENTLY I'M VICE PRESIDENT FOR GLOBAL CUSTOMER SUPPORT  
7        FOR ORACLE.

8        **Q.**     WHAT IS ENTERPRISE APPLICATION SOFTWARE?

9        **A.**     ENTERPRISE APPLICATION SOFTWARE IS SOFTWARE THAT PROVIDES  
10       SOLUTIONS FOR OUR CUSTOMERS TO -- THAT ACTUALLY PROVIDE  
11       BUSINESS SOLUTIONS FOR COMPLEX PROCESSES. SO IT CAN BE  
12       ANYWHERE FROM THE PAYROLL CHECKS THAT YOU GET ON A WEEKLY OR  
13       MONTHLY BASIS, CAN BE RUNNING FINANCIALS, WHICH IS ACCOUNTS  
14       RECEIVABLES, ACCOUNTS PAYABLES, INVOICING, LOGISTICS, MANAGING  
15       YOUR WAREHOUSE, MANAGING THE INVENTORY WITHIN YOUR WAREHOUSE,  
16       MANAGING THE TRANSPORTATION TICKET TO THE SHOP ITSELF, AND ALSO  
17       EVEN MANUFACTURING SOFTWARE AS WELL.

18       **Q.**     IS IT EXPENSIVE?

19       **A.**     IT IS VERY EXPENSIVE. IT CERTAINLY CAN BE. IT REQUIRES  
20       AN UP FRONT LICENSE FEE AS WE HAVE TALKED ABOUT BEFORE, WHICH  
21       CAN BE UPWARDS INTO MILLIONS OF DOLLARS.

22               THE TRAINING THAT IS USED WITHIN OUR CUSTOMER  
23       ENVIRONMENT AND THE END USERS IS ALSO EQUALLY EXPENSIVE, AND  
24       THE IMPLEMENTATION CAN BE EXPENSIVE AS WELL.

25       **Q.**     ALL RIGHT.

1                   NOW ONCE IT IS INSTALLED, PEOPLE ARE TRAINED, ARE  
2                   THERE ANY OTHER COSTS?

3       **A.**     THERE IS. SO THERE IS AN ANNUAL MAINTENANCE FEE THAT OUR  
4                   CUSTOMERS WILL PAY AS WELL.

5       **Q.**     HOW DO YOU EXPLAIN WHAT THAT COST IS FOR, WHAT THAT  
6                   MAINTENANCE IS?

7       **A.**     SO FIRST YOU NEED TO START WITH A, I GUESS INSTALLED  
8                   ENVIRONMENT, IF YOU WILL. SO IF YOU THINK ABOUT -- I GUESS A  
9                   SIMILAR EXAMPLE FOR YOU TO PUT TOGETHER IS TAKE, FOR EXAMPLE,  
10                  YOUR PC. ON YOUR PERSONAL COMPUTER YOU CAN DOWNLOAD WORD,  
11                  ADOBE, OR EXCEL. ONCE YOU DOWNLOAD IT, THEN YOU NEED TO  
12                  MAINTAIN IT. SO THOSE AUTOMATIC FIXES THAT YOU POTENTIALLY  
13                  GET, THE UPDATES THAT YOU GET TO MAKE SURE THAT IT STAYS UP TO  
14                  DATE, THAT IS THE SUPPORT MAINTENANCE OF IT. AND THEN ALSO THE  
15                  RIGHTS TO UPGRADE TO FUTURE RELEASES AS WELL.

16                SO IT'S A VERY SIMPLE EXAMPLE FOR THE ERP INDUSTRY  
17                  OR THE ENTERPRISE APPLICATION INDUSTRY. THAT'S A VERY COMPLEX  
18                  THING TO DO AND WE WANT TO MAKE SURE THAT OUR CUSTOMERS GET ALL  
19                  THOSE CRITICAL FIXES THAT THEY NEED.

20       **Q.**     I WOULD LIKE YOU TO TAKE A LOOK AT YOUR WITNESS BINDER  
21                  TAB 1.

22       **A.**     UH-HUH.

23       **Q.**     THAT'S PLAINTIFFS' DEMONSTRATIVE 14.

24                       IS THAT A CHART THAT YOU CREATED TO HELP EXPLAIN  
25                       WHAT SUPPORT IS FROM ORACLE?

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1     **A.**     YES, IT IS.  IT'S NOT A COMPLETE LIST, BUT IT COVERS THE  
2     MOST OF IT.

3                 **MR. HOWARD:**  CAN WE PLEASE PUT THAT UP?

4                 (DOCUMENT DISPLAYED ON SCREEN.)

5     **BY MR. HOWARD:**

6     **Q.**     ALL RIGHT.

7                 USING YOUR CHART, WOULD YOU TAKE US THROUGH AND  
8     START WITH THE FIRST ONE THERE.  PRODUCT AND TECHNOLOGY  
9     ENHANCEMENTS AND RELEASES, AND EXPLAIN WHAT THAT IS, PLEASE?

10    **A.**     SO PRODUCT AND TECHNOLOGY ENHANCEMENTS, THIS IS WHERE A  
11    LOT OF OUR INVESTMENT GOES WHEN WE DEVELOP AND FIX OUR  
12    SOFTWARE.

13                THIS IS WHERE WE WORK WITH OUR CUSTOMERS, WE WORK  
14    WITH BUSINESS PARTNERS, THE SUPPORT ORGANIZATION WORKS WITH OUR  
15    DEVELOPMENT COUNTERPARTS, AND TOGETHER WE ALL DEVELOP THOSE  
16    ENHANCEMENTS FOR THESE MAJOR APPLICATIONS.  THEY CAN BE MAJOR  
17    FUNCTIONALITY COMPONENTS, THEY CAN BE, YOU KNOW, THOSE  
18    INNOVATIVE THINGS THAT KEEP OUR CUSTOMERS COMPETITIVE.

19                THOSE ARE DELIVERED ANYWHERE FROM 18 TO 24 MONTHS.  
20    SO THEY ARE VERY LARGE AND COMPLEX TO PUT TOGETHER.

21                **MR. HOWARD:**  YOUR HONOR, WOULD IT BE ACCEPTABLE TO  
22    ASK THE JURY IF THEY CAN SEE THE CHART WITH ME STANDING HERE?

23                **THE COURT:**  YES.

24                LADIES AND GENTLEMEN, ANY OF YOU HAVE ANY DIFFICULTY  
25    SEEING THE ENTIRETY OF THE BOARD?

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1 (NO RESPONSE.)

2 **MR. HOWARD:** GREAT. THANK YOU, YOUR HONOR.

3 **BY MR. HOWARD:**

4 **Q.** SO THE SECOND ONE IS KNOWLEDGE DOCUMENTS AND SOLUTIONS.

5 WHAT IS THAT?

6 **A.** KNOWLEDGE DOCUMENTS AND SOLUTIONS, THESE ARE DOCUMENTS,  
7 ACTUALLY, SO WORD DOCUMENTS THAT OUR SUPPORT ORGANIZATION WORKS  
8 ON ON A DAILY BASIS. THOSE DOCUMENTS CAN BE ANYWHERE FROM  
9 ONE-PAGE DOCUMENTS WHERE IT'S KIND OF A TIP OR JUST A HELPFUL  
10 THING THAT HELPS MAKING OUR APPLICATIONS BETTER.

11 CAN ALSO BE VERY COMPLEX. ALMOST 40 TO 50 PAGES  
12 LONG, MULTIPLE-STEP PROCESSES TO HELP OUR CUSTOMERS FINE TUNE  
13 THEIR SYSTEMS. IT CAN ALSO HAVE CODE CHANGES IN IT. IT CAN  
14 ALSO BE VERY SPECIFIC TO ENHANCING THEIR APPLICATIONS AS WELL.

15 **Q.** CAN YOU GIVE US JUST AN EXAMPLE OF WHAT ONE OF THOSE MIGHT  
16 BE?

17 **A.** SURE.

18 THIS IS ACTUALLY QUITE A TIMELY EXAMPLE WITH THE  
19 DAYLIGHT SAVINGS TIME CHANGE COMING IN THE NEXT WEEKEND.

20 SEVERAL YEARS AGO OUR CONGRESS ACTUALLY CHANGED THE  
21 WEEK THAT THE DAYLIGHT SAVINGS TIME HAPPENED. AND IN THAT, FOR  
22 YOU AND I THAT IS A VERY SIMPLE CHANGE, BUT IN ERP SOFTWARE OR  
23 IN THE APPLICATION SOFTWARE ITSELF THERE IS ACTUALLY SEVERAL  
24 DEPENDENCIES ON ANYTHING THAT MIGHT BE TIME STAMPED.

25 SO FINANCIAL RECORDS, EMPLOYMENT RECORDS, ANY SORT

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1 OF DATA THAT HAS ANY SORT OF DATES IN IT WHICH IS PRETTY MUCH  
2 ALL OF THE APPLICATIONS THAT WE HAVE WITHIN OUR SOFTWARE.

3 THAT DAYLIGHT SAVINGS DOCUMENT, WE ACTUALLY HAD A  
4 TEAM OF PEOPLE THAT -- OF DEVELOPERS AND SUPPORT ENGINEERS. WE  
5 WORKED AND EVALUATED ALL OF OUR RELEASES, ALL OF THE SOFTWARE  
6 BETWEEN J.D. EDWARDS, PEOPLESFT AND ACTUALLY ALL OF OUR  
7 APPLICATIONS WITHIN ORACLE. AND WE PUT TOGETHER A VERY COMPLEX  
8 DOCUMENT SEVERAL-STEP PROCESS. AGAIN, IT WAS FOR ALL OF OUR  
9 APPLICATIONS AND ALL OF OUR RELEASES AS WELL. SO IT WAS  
10 ACTUALLY QUITE EXPENSIVE.

11 TOMORROWNOW ACTUALLY TOOK THAT DOCUMENT AND PUT IT  
12 ON TO THEIR WEBSITE AS WELL.

13 **Q.** RETURNING TO YOUR LIST, CRITICAL FIXES, PATCHES AND  
14 SECURITY ALERTS IS YOUR NEXT ITEM. WHAT'S THAT?

15 **A.** SO THIS IS A VERY CRITICAL COMPONENT OF HOW WE DELIVER OUR  
16 SOFTWARE. THESE ARE VERY SPECIFIC FIXES. THERE ARE TYPICALLY  
17 CODE CHANGES, VERY SIMILAR TO THOSE SOFTWARE UPDATES THAT YOU  
18 MIGHT GET IN WORD AND ADOBE, THOSE VERY SPECIFIC THINGS WHERE  
19 THEY SAY "CAN YOU INSTALL THIS UPDATE?" AND YOU SAY "YES".

20 FOR THE ENTERPRISE APPLICATION SOFTWARE, THESE CAN  
21 BE HIGHLY CRITICAL AND ALSO VERY DEPENDENT ON THEIR -- ALL OF  
22 THE TECHNOLOGY THAT THEY HAVE WITHIN THE ENVIRONMENT. IF YOU  
23 MAKE ONE CHANGE TO ONE COMPONENT OF YOUR ENVIRONMENT, THE  
24 APPLICATION CAN REACT TO THAT AND YOU WILL NEED THAT FIX FOR  
25 THAT.

1 IT IS VERY MUCH LIKE AN INSURANCE POLICY, IF YOU  
2 WILL, TO MAKE SURE YOU KEEP UP AND RUNNING ON A 24/7 FOR ALL OF  
3 YOUR BUSINESS CRITICAL PROCESSES.

4 Q. THE LAST ONE IS TAX, LEGAL, AND REGULATORY UPDATES. CAN  
5 YOU TELL US WHAT THOSE ARE?

6 A. SURE.

7 TAX, LEGAL, AND REGULATORY UPDATES. THIS IS A VERY  
8 BIG DEAL.

9 IT'S -- SO THINK ABOUT YOUR PAYCHECK, IF YOU WILL.  
10 ON YOUR PARTICULAR PAYCHECK, YOU HAVE SEVERAL DIFFERENT  
11 CALCULATIONS. ON THOSE CALCULATIONS ARE PART-TIME, FULL-TIME,  
12 JURY DUTY, ALL OF THE TAX CALCULATIONS.

13 AND IF YOU KEEP IN MIND OUR SOFTWARE NOT ONLY WORKS  
14 WITH IT AT THE LOCAL LEVEL, BUT THE STATE LEVEL, ALSO IN DOZENS  
15 OF COUNTRIES AROUND THE WORLD. SO WE ACTUALLY HAVE PEOPLE  
16 WORLDWIDE WORKING ON ALL OF THOSE LEGISLATIVE UPDATES. AND  
17 THAT IS JUST THE PAYCHECK SIDE OF THE HOUSE.

18 THERE'S ALSO TAX ISSUES, TAX IMPLICATIONS AS WELL AS  
19 LEGISLATIVE UPDATES IN ALL OF THOSE COUNTRIES AS WELL.

20 ONE OF OUR LARGEST CUSTOMER, YOU KNOW, DARDEN  
21 RESTAURANTS FOR RED LOBSTER AND OLIVE GARDEN IS ONE OF OUR  
22 HUGEST PAYROLL CUSTOMERS FOR PEOPLESOFT AND THEY USE THAT SAME  
23 SOFTWARE FOR THOUSANDS AND THOUSANDS OF THEIR EMPLOYEES.

24 Q. NOW, TAKING ALL OF THE DIFFERENT KINDS OF SUPPORT YOU JUST  
25 DESCRIBED, DO ALL OF ORACLE'S CUSTOMERS WHO LICENSE ORACLE

1 SOFTWARE GET ALL OF THESE FORMS OF SUPPORT?

2 **A.** THEY DO IF THEY PAY THEIR ANNUAL MAINTENANCE PAYMENT.

3 ONCE THEY LICENSE THE SOFTWARE AND THEN THEY PAY THEIR ANNUAL  
4 MAINTENANCE, THEY GET THE RIGHTS TO USE ALL OF OUR STUFF THAT  
5 WE CREATE.

6 **Q.** WHY IS IT YOU REQUIRE THE MAINTENANCE PAYMENT IN ORDER TO  
7 GET THE SUPPORT?

8 **A.** AS YOU CAN SEE, SUPPORT IS ACTUALLY VERY COSTLY. WE HAVE  
9 THOUSANDS OF SUPPORT EMPLOYEES. WE ALSO HAVE THOUSANDS OF  
10 DEVELOPERS AS WELL WORKING TO DEVELOP AND ENHANCE ALL OF THE  
11 THINGS THAT YOU SEE HERE.

12 MOST OF OUR CUSTOMERS ACTUALLY CHOOSE TO RENEW THEIR  
13 MAINTENANCE ON AN ANNUAL BASIS AS WELL.

14 **Q.** HOW DOES ORACLE GET THESE VARIOUS SUPPORT PRODUCTS OUT TO  
15 ITS CUSTOMERS?

16 **A.** WE HAVE A SECURED WEBSITE THAT OUR CUSTOMERS GET A USER ID  
17 AND A PASSWORD FOR.

18 **Q.** WAS THAT TRUE IN 2005, 2006 AS WELL?

19 **A.** IN 2005 WE HAD A WEBSITE THAT WAS CALLED CUSTOMER  
20 CONNECTION. AND IT WAS OFF OF THE PEOPLESOFT.COM WEBSITE AND  
21 IT WAS, AGAIN, A SECURED WEBSITE FOR OUR LICENSE AND  
22 MAINTENANCE PAYING CUSTOMERS TO HAVE A USER ID AND A PASSWORD  
23 TO BE ABLE TO DOWNLOAD THOSE FIXES.

24 **Q.** FOR WHAT TYPES OF SOFTWARE WAS THAT OF THAT PASSWORD SITE  
25 AVAILABLE?

1 **A.** ALL OF THE FIXES THAT YOU SEE HERE, SO ALL OF THE PRODUCT  
2 AND TECHNOLOGY ENHANCEMENTS, THE KNOWLEDGE DOCUMENTS, THE  
3 FIXES, THE LEGAL AND REGULATORY UPDATES AS WELL.

4 **Q.** WAS THAT FOR PEOPLESOFT?

5 **A.** IT WAS FOR PEOPLESOFT AND IT WAS ALSO FOR J.D. EDWARDS.

6 **Q.** WHO HAD LOGIN CREDENTIALS TO GET INTO THE SITE TO GET  
7 THESE SUPPORT PRODUCTS?

8 **A.** SO WHEN A CUSTOMER RENEWED THEIR MAINTENANCE, THEY WOULD  
9 RECEIVE A SPECIFIC ACCOUNT ID OR CUSTOMER ID. AND ATTACHED TO  
10 THAT CUSTOMER ID ARE CALLED REPRESENTATIVES.

11 SO, FOR EXAMPLE, LAND O' LAKES, ONE OF OUR LARGE  
12 J.D. EDWARDS CUSTOMERS. LAND O' LAKES WOULD HAVE AN ACCOUNT ID  
13 AND ATTACHED TO THAT ACCOUNT ID IS -- LET'S SAY THEY CHOSE TO  
14 HAVE FIVE REPRESENTATIVES. EACH ONE OF THOSE FIVE  
15 REPRESENTATIVES HAS A USER ID AND PASSWORD TO LOG INTO THIS  
16 WEBSITE.

17 **Q.** DID THERE COME A TIME WHEN YOU CAME TO SUSPECT THAT  
18 SOMEBODY MIGHT BE TAKING INTELLECTUAL PROPERTY PROVIDED TO  
19 CUSTOMERS THROUGH THAT ORACLE WEBSITE?

20 **A.** YES.

21 **Q.** TELL US WHAT HAPPENED.

22 **A.** SO IN NOVEMBER OF 2006, I RAN A PROACTIVE REPORT ON  
23 ACTUALLY A CRITICAL FIX THAT WE NEEDED TO FOLLOW UP CONTACT  
24 WITH OUR CUSTOMERS.

25 IN THIS REPORT, I EXPECTED A SMALL AMOUNT OF



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1 CUSTOMERS BECAUSE IT WAS A VERY SPECIFIC FIX FOR OUR IBM  
2 OPERATING SYSTEM AS WELL AS A PAYROLL FIX AS WELL.

3 IN THIS INITIAL REPORT, I SAW FALSE INFORMATION AS  
4 WELL AS IT WAS HUNDREDS OF DOWNLOADS. AND UPON FURTHER  
5 INFORMATION SAW THOUSANDS OF DOWNLOADS BY THESE CREDENTIALS.  
6 IT WAS THINGS LIKE -- THE FALSE INFORMATION WAS THINGS LIKE  
7 FALSE PHONE NUMBERS.

8 SO IN THIS PROACTIVE OUTREACH, WE WOULD PHONE CALL  
9 OUR CUSTOMERS OR SEND THEM A FOLLOW-UP E-MAIL TO GIVE THEM  
10 FURTHER INFORMATION. SEVENS OVER AND OVER AGAIN. SO 777-7777.  
11 THEIR E-MAIL ADDRESSES WERE INCORRECT SO THEY DIDN'T HAVE THE  
12 DOT COMS OR IT WAS SHORTENED OR ABBREVIATED NAMES. AND THEN  
13 THE USER ID'S WERE VERY SIMILAR. IT SOUNDED LIKE TOMORROWNOW.  
14 SO TOM NOW, TOM NOW TWO.

15 **Q.** WHAT DID YOU DO WHEN YOU SAW THAT INFORMATION?

16 **A.** WE IMMEDIATELY CONTACTED OUR GLOBAL INFORMATION SECURITY  
17 TEAM. THEY IMMEDIATELY FOLLOWED UP AND LET US KNOW THAT THESE  
18 DOWNLOADS WERE GOING TO A TOMORROWNOW IP ADDRESS IN BRYAN,  
19 TEXAS.

20 **Q.** WERE THERE OTHER INDICATIONS BEYOND WHAT YOU HAVE JUST  
21 DESCRIBED THAT TOMORROWNOW WAS DOWNLOADING FROM ORACLE?

22 **A.** YES. THERE WAS, I GUESS, SUSPICIOUS BEHAVIOR, IF YOU  
23 WILL, WITH OUR KNOWLEDGE DOCUMENTS AND SOLUTIONS.

24 **Q.** LET ME ASK YOU TO LOOK IN YOUR WITNESS BINDER AT TAB 2.  
25 AND THAT'S PLAINTIFFS' TRIAL EXHIBIT 545-4.

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1 (EXHIBIT DISPLAYED ON SCREEN.)

2 DOES THAT -- FIRST OF ALL, TELL US WHAT THAT IS.

3 **A.** SURE. THIS IS A SCREEN. ONCE YOU LOG IN TO CUSTOMER  
4 CONNECTION. THIS IS ACTUALLY A SEARCH RESULT SCREEN.

5 SO IF I SEARCH FOR A SOLUTION THAT I MIGHT NEED,  
6 THIS IS THE RESULT SCREEN THAT SHOWS UP. IT'S KIND OF HARD FOR  
7 YOU ALL TO SEE, BUT IF -- ON THE TOP OF THE SCREEN, YOU WILL  
8 SEE TWO BOXES, A SMALL BOX THAT SAYS "YES", AND A LONGER BOX  
9 THAT SAYS, "NO CONTINUE TO SEARCH."

10 OH. THANK YOU.

11 **Q.** LET ME ASK: IS THAT -- THE "YES" AND THE "NO", IS THAT  
12 THE WAY THAT THE SITE, FAIR AND ACCURATE DEPICTION OF THE WAY  
13 CUSTOMER CONNECTION LOOKED IN ABOUT 2005?

14 **A.** YES, IT IS.

15 **Q.** WHAT'S THE POINT OF THE YES AND NO?

16 **A.** SO THE YES AND NO, WE USE THAT INFORMATION TO UNDERSTAND  
17 IF OUR DOCUMENTS WERE VALUABLE. AND IF OUR -- IF THE DOCUMENT  
18 SOLVED THE CUSTOMER'S QUESTION THAT THEY WERE ASKING OR WHAT  
19 THEIR ISSUE WAS.

20 SO MOST OF THE TIME WE SEE, "YES" ATTACH TO OUR  
21 RESEARCH WHEN WE DO RESEARCH TO MAKE SURE THAT THIS IS VALID  
22 INFORMATION THAT WE ARE GIVING OUT THERE.

23 THE SUSPICIOUS BEHAVIOR THAT WE SAW WAS ACTUALLY ALL  
24 NO CLICKS. AND THERE WERE THOUSANDS OF NO CLICKS. AND THE NO  
25 CLICKS WERE SECONDS APART, SUBSECONDS APART IN SOME CASES, SO

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1 WE KNEW THAT THERE WAS OBVIOUSLY SUSPICIOUS BEHAVIOR AND WE  
2 ALSO KNEW THAT THERE WAS SOME SORT OF AUTOMATED TOOL IN PLACE  
3 AS WELL.

4 **Q.** WERE YOU ABLE TO DETERMINE WHERE THE AUTOMATED NO CLICKS  
5 WERE COMING FROM?

6 **A.** THE SAME INFORMATION WAS SENT TO OUR GLOBAL INFORMATION  
7 SECURITY TEAM AND THEY FOUND THE SAME INFORMATION. ALL OF THE  
8 INFORMATION WAS DOWNLOADED TO THE TOMORROWNOW IP ADDRESS IN  
9 BRYAN, TEXAS.

10 **Q.** WAS THE DATA THAT YOU WOULD BE LOOKING AT IN THE -- IN  
11 LOOKING AT THE YESES AND THE NOS, WAS THAT DATA USABLE WHEN  
12 THERE WERE THOUSANDS OF NO CLICKS IN IT?

13 **A.** NO. ACTUALLY IT CORRUPTED OUR ABILITY TO ANALYZE THE  
14 BENEFITS OF ANY OF THESE DOCUMENTS.

15 IF YOU CAN IMAGINE WE WERE USED TO SEEING YES CLICKS  
16 OR, YOU KNOW, AND A FEW NOS. SO FOR THE NOS THAT WE SAW, WE  
17 WOULD MAKE ADJUSTMENTS. BUT WHEN YOU HAVE THOUSANDS OF NO  
18 CLICKS, WE WEREN'T ABLE TO USE THE INFORMATION AT ALL.

19 **Q.** WERE YOU THEN INVOLVED IN AN INVESTIGATION TO DETERMINE  
20 THE NATURE AND THE EXTENT OF THE DOWNLOADING BY TOMORROWNOW  
21 FROM ORACLE?

22 **A.** YES. I MANAGED A TEAM OF TEN PEOPLE THAT WORKED SEVERAL  
23 WEEKS TO ANALYZE THE THOUSANDS OF DOWNLOADS WITH CUSTOMER  
24 CREDENTIALS.

25 **Q.** WHAT HAPPENED AT THE END OF THAT INVESTIGATION?

1       **A.**     ORACLE FILED A LAWSUIT AGAINST SAP.

2               **MR. HOWARD:**   THANK YOU.

3               YOUR HONOR, NOTHING FURTHER.

4               **THE COURT:**   ALL RIGHT.   CROSS-EXAMINATION?

5                               **CROSS-EXAMINATION**

6       **BY MR. COWAN:**

7       **Q.**     GOOD AFTERNOON, MS. RANSOM.   I AM SCOTT COWAN FOR THE  
8       DEFENDANTS.   I HAVE A FEW THINGS TO FOLLOW UP WITH YOU ON.

9               ONE OF THE THINGS WE HEARD IN MR. HOWARD'S OPENING  
10       STATEMENT WAS AN ACKNOWLEDGMENT, AND I THINK IMPLICITLY IN YOUR  
11       TESTIMONY AN ACKNOWLEDGMENT THAT CUSTOMERS HAVE A CHOICE WHEN  
12       IT COMES TO OBTAINING MAINTENANCE FOR THEIR ORACLE SOFTWARE.

13              WOULD YOU AGREE WITH ME?

14       **A.**     THERE ARE TIMES IN A CUSTOMER'S LIFE CYCLE TO WHERE, YES,  
15       A SMALL PERCENTAGE OF OUR CUSTOMERS CAN HAVE A MAINTENANCE THAT  
16       IS NOT THE OVERALL ORACLE MAINTENANCE.

17       **Q.**     BECAUSE YOU SAID IN RESPONSE TO MR. HOWARD'S QUESTIONING  
18       THAT MOST OF ORACLE'S CUSTOMERS RENEW, BUT YOU DIDN'T SAY ALL.  
19       SO THAT MEANS THERE ARE SOME THAT DON'T, RIGHT?

20       **A.**     THAT'S CORRECT.   WE HAVE CUSTOMERS THAT GO BANKRUPT OR GET  
21       ACQUIRED, AND THOSE CUSTOMERS TYPICALLY DON'T RENEW.

22       **Q.**     SO YOU WOULD AGREE WITH ME THAT IN DETERMINING WHY AN  
23       ORACLE CUSTOMER HAS CHOSEN A PARTICULAR SOFTWARE MAINTENANCE  
24       PROVIDER, OR WHETHER THEY HAVE CHOSEN TO SELF-SUPPORT, THAT  
25       THAT DETERMINATION NEEDS TO BE MADE BASED UPON A CUSTOMER

1 SPECIFIC ANALYSIS, CORRECT?

2 **A.** SO THE CUSTOMERS -- YES. THE CUSTOMERS NEED TO ANALYZE  
3 THEIR ENTIRE SITUATION, IF YOU WILL, THE LIFE CYCLE THAT THEY  
4 ARE IN, AND MAKE SURE THEY MAKE THE RIGHT CHOICE.

5 **Q.** AND LIKEWISE, AS WE ARE DOING HERE IN THIS COURTROOM, IF  
6 WE ARE GOING TO ANALYZE WHY A GIVEN CUSTOMER LEFT, WE ARE GOING  
7 TO HAVE TO ANALYZE THAT INFORMATION ON A CUSTOMER BY CUSTOMER  
8 BASIS, RIGHT?

9 **A.** I WOULD AGREE WITH THAT. WE WOULD NEED TO LOOK AT ALL OF  
10 THOSE CUSTOMERS THAT LEFT AND, I GUESS, INCLUDING THE BANKRUPT  
11 ONES AS WELL.

12 **Q.** AND TAKING ASIDE THE ANALYSIS THAT MR. MITTELSTAEDT  
13 REFERRED TO THAT MR. MEYER, PLAINTIFFS' EXPERT HAS DONE ON  
14 THAT, AND THE ANALYSIS THAT DEFENDANTS' EXPERT, MR. CLARK, HAS  
15 DONE, HAVE YOU PERSONALLY DONE ANY CUSTOMER-BY-CUSTOMER  
16 ANALYSIS OF WHY CUSTOMERS WENT FROM ORACLE TO TOMORROWNOW?

17 **A.** I WOULD SAY, NO, I DIDN'T DO A CUSTOMER-BY-CUSTOMER  
18 ANALYSIS. I DO HAVE A GREAT KNOWLEDGE OVER THE 17 YEARS OF  
19 WORKING WITH THE ERP CUSTOMERS.

20 **Q.** AND LIKEWISE YOU HAVE NOT PERFORMED A CUSTOMER-BY-CUSTOMER  
21 ANALYSIS TO DETERMINE WHY SOME TOMORROWNOW CUSTOMERS BOUGHT SAP  
22 SOFTWARE, HAVE YOU?

23 **A.** WE WORK WITH OUR CUSTOMERS TO MAKE SURE THAT THEY  
24 UNDERSTAND THE VALUE OF ORACLE SUPPORT, THEY UNDERSTAND THE  
25 VALUE OF THE MAINTENANCE THAT THEY HAVE. SO, YOU KNOW, IN SOME

1 CASES I HAVE TALKED TO CUSTOMERS SPECIFICALLY.

2 **Q.** YOU MAY HAVE DONE SOME -- IN JUST YOUR NORMAL DIALOGUE  
3 WITH CUSTOMERS YOU MAY HAVE OBTAINED THAT INFORMATION, BUT YOU  
4 HAVEN'T YOURSELF SAT DOWN AND DONE A CUSTOMER-BY-CUSTOMER  
5 ANALYSIS, FOR EXAMPLE, OF THE 86 CUSTOMERS THAT  
6 MR. MITTELSTAEDT REFERRED TO IN HIS OPENING STATEMENT, HAVE  
7 YOU?

8 **A.** THAT'S FAIR.

9 **Q.** YOU WOULD ALSO AGREE WITH ME THAT OVER THE TIME THAT  
10 TOMORROWNOW WAS IN EXISTENCE BEFORE IT WAS WOUND DOWN IN  
11 OCTOBER 31ST OF 2008, THERE WERE OTHER THIRD PARTY SUPPORT  
12 PROVIDERS OUT THERE IN THE MARKET, CORRECT?

13 **A.** HOW WOULD YOU DEFINE -- COULD YOU HELP ME WITH THE  
14 DEFINITION OF WHAT YOU DEFINE THIRD PARTY VENDORS ARE?

15 **Q.** SURE. MR. HOWARD, IN HIS OPENING STATEMENT, REFERRED TO  
16 SOME COMPANIES OUT THERE THAT PROVIDE SUPPORT THAT DON'T  
17 PROVIDE THE SOFTWARE. MR. MITTELSTAEDT REFERRED TO THE SAME  
18 THING. SO THAT'S MY DEFINITION OF THIRD PARTY SUPPORT.

19 DO YOU UNDERSTAND THAT NOW?

20 **A.** YES.

21 **Q.** AND WOULD YOU AGREE WITH ME THEN THAT TOMORROWNOW, DURING  
22 THE TIME PERIODS THAT IT EXISTED, IN PARTICULARLY DURING THE  
23 TIME PERIODS THAT SAP OWNED IT, UP UNTIL THE TIME IT WOUND  
24 DOWN, IT WASN'T THE ONLY PLAYER IN THE THIRD PARTY SUPPORT  
25 MARKET, RIGHT?

1     **A.**     I AM AWARE OF OTHER COMPANIES THAT HAVE HAD IT, BUT I HAVE  
2     TO SAY THAT THE MAJOR THREAT THAT WE HAD WAS TOMORROWNOW.

3     **Q.**     AND YOU'VE ALSO -- AND A COUPLE OF THOSE COMPANIES WOULD  
4     BE A COMPANY CALLED VERSYTEC AND CONNEXUS, RIGHT? THOSE ARE  
5     COMPANIES THAT YOU, WHILE WORKING AT PEOPLESOFT AND WORKING AT  
6     ORACLE, WERE AWARE WIRE OF, RIGHT?

7     **A.**     WE WERE AWARE OF THEM, BUT LIKE I SAID, TOMORROWNOW WAS  
8     DEFINITELY THE TOP PLAYER.

9     **Q.**     YOU HAVE ALSO INDICATED EARLIER IN YOUR TESTIMONY HERE  
10    WITH ME TALKING TO YOU TODAY, THAT THERE IS SOME REASONS,  
11    VARIETY OF REASONS WHY SOME CUSTOMERS DECIDE NOT TO RENEW WITH  
12    ORACLE, AND TO EITHER GO TO SELF SUPPORT OR FIND ANOTHER  
13    MAINTENANCE PROVIDER, RIGHT; YOU RECALL THAT TESTIMONY SO FAR?

14    **A.**     YES.

15    **Q.**     AND ONE OF THOSE KINDS OF CUSTOMERS FOR WHICH THIRD PARTY  
16    SUPPORT IS AN OPTION IS A CUSTOMER WHOSE ERP SYSTEM, ENTERPRISE  
17    APPLICATION PROGRAM SYSTEM IS VERY, VERY STABLE. THEY MAY BE  
18    ON AN OLDER RELEASE, THEY DON'T NEED THE SOFTWARE LIKE  
19    MR. MITTELSTAEDT REFERRED TO IN OPENING STATEMENT, AND ALL THEY  
20    WANT IS A LITTLE BIT OF CRITICAL SUPPORT TO GET THEM THROUGH  
21    FOR THE LIFE OF THAT PRODUCT.

22               THAT WOULD BE ONE OF THOSE KINDS OF CUSTOMERS THAT  
23    MIGHT CONSIDER NOT RENEWING WITH ORACLE, RIGHT?

24    **A.**     WE HAVE DEFINITELY BOTH CUSTOMERS THAT RENEW WITH US THAT  
25    ARE IN THAT STATE OF ENVIRONMENT AS WELL AS CUSTOMERS THAT

1 LEAVE AS WELL.

2 Q. AND LIKEWISE, IT WOULD FALL INTO THAT CATEGORY, SOME THAT  
3 MIGHT RENEW AND SOME THAT MIGHT NOT, WOULD BE A CUSTOMER THAT  
4 DOESN'T PLAN ON UPGRADING ANY TIME SOON, CORRECT?

5 A. I THINK THERE ARE STAGES IN CUSTOMERS' LIFE CYCLE THEY  
6 CHOOSE NOT TO UPGRADE, BUT THAT DOESN'T NECESSARILY MEAN THAT  
7 THEY MIGHT LEAVE ORACLE THOUGH.

8 Q. THAT IS A FACTOR THAT COULD INFLUENCE THEIR DECISION IN  
9 LEAVING ORACLE, COULD IT NOT?

10 A. IT COULD BE.

11 Q. AND ANOTHER CATEGORY OF CUSTOMER THAT MIGHT CONSIDER  
12 LEAVING ORACLE AND EITHER SELF-SPORTING OR GOING TO A THIRD  
13 PARTY, ANOTHER THIRD PARTY SUPPORT PROVIDER IS THOSE KIND OF  
14 CUSTOMERS THAT HAVE HIGHLY CUSTOMIZED ENVIRONMENTS.

15 WOULD YOU AGREE WITH ME?

16 A. WE DO HAVE CUSTOMERS WITH CUSTOMIZED ENVIRONMENTS.  
17 ACTUALLY MOSTLY OF OUR CUSTOMERS HAVE CUSTOMIZED IN SOME SHAPE  
18 OR FORM, SO IT'S DEFINITELY A CONSIDERATION, BUT IT'S PROBABLY  
19 NOT THEIR ENTIRE DECISION.

20 Q. ORACLE DOESN'T SUPPORT THOSE CUSTOMIZATIONS AT ITS BASIC  
21 MAINTENANCE FEE, DOES IT?

22 A. I DON'T -- WELL, I GUESS MAYBE I WOULD PUT IT THIS WAY.  
23 WE OFFER A LOT OF FLEXIBLE SOLUTIONS FOR OUR CUSTOMERS TO  
24 DOWNLOAD FIXES. WE GIVE CODE CHANGE DOCUMENTS AS AN EXAMPLE  
25 THAT TELL THEM LINE BY LINE WHAT TO CHANGE SO THEY CAN ACTUALLY



1 USE THAT INFORMATION IN THEIR CUSTOM ENVIRONMENT.

2 SO WHILE WE DON'T SUPPORT A WHOLE CUSTOM  
3 ENVIRONMENT, WE ABSOLUTELY TRY OUR BEST TO HELP THEM.

4 Q. YOU, IN RESPONDING TO MR. HOWARD'S QUESTIONS EARLIER, YOU  
5 INDICATED YOU WERE AT J.D. EDWARDS FIRST, RIGHT?

6 A. YES.

7 Q. AND THEN J.D. EDWARDS WAS ACQUIRED BY PEOPLESOFT, RIGHT?

8 A. UH-HUH, YES.

9 Q. AND IN THAT TRANSITION THERE WERE SOME CUSTOMER CONCERNS  
10 BY THE J.D. EDWARDS CUSTOMERS WHETHER THEY WERE GOING TO BE  
11 TREATED PROPERLY, WHAT WERE THE PRODUCT PLANS FOR J.D. EDWARDS  
12 WHEN PEOPLESOFT BOUGHT THEM, RIGHT?

13 A. ABSOLUTELY. THERE WAS CONFUSION IN THE MARKET. I THINK  
14 WITH ANY ACQUISITION, YOU GET THAT CONFUSION IN THE MARKET.

15 Q. THEN THAT CONFUSION WAS DOUBLED UP WHEN PEOPLESOFT WAS  
16 ACQUIRED THROUGH A HOSTILE TAKEOVER BY ORACLE, CORRECT?

17 A. I DON'T KNOW IF I WOULD AGREE WITH THAT ACTUALLY. ORACLE,  
18 IMMEDIATELY AFTER ORACLE DID THEIR ACQUISITION, WE CAME OUT  
19 WITHIN I BELIEVE IT WAS WITHIN DAYS, IF NOT WITHIN A WEEK, OF A  
20 CLEAR COMMUNICATION PLAN.

21 OUR EXECUTIVES DID A ROAD SHOW TO WHERE THEY WENT  
22 FROM CITY TO CITY TO MEET WITH OUR DIRECT CUSTOMERS. WE HAD AN  
23 OPEN CONFERENCE CALL FOR ALL CUSTOMERS AS WELL TO SHARE WITH  
24 THEM OUR LIFETIME SUPPORT STRATEGY WHICH WAS, YOU KNOW, THE  
25 BEST STRATEGY IN THE BUSINESS.

1 Q. SO, IS YOUR TESTIMONY THAT YOU DON'T THINK THAT THE  
2 CUSTOMERS, PARTICULARLY THE J.D. EDWARDS CUSTOMER, THOSE  
3 CUSTOMERS YOU WERE FAMILIAR WITH FROM THE VERY BEGINNING BEFORE  
4 PEOPLESOFT AND ORACLE CAME INTO PLAY, IS IT YOUR TESTIMONY THAT  
5 THOSE CUSTOMERS DIDN'T GO THROUGH TWO WAVES OF UNCERTAINTY?

6 A. NO. I COMPLETELY AGREE WITH YOU. THERE WAS DEFINITELY  
7 TWO WAVES, BUT ORACLE DID A VERY GOOD JOB OF TRYING TO GET ALL  
8 OF OUR CUSTOMERS COMMUNICATED AND BACK ON TRACK.

9 Q. MR. HOWARD REFERRED YOU TO A DOCUMENT THAT IS NOW INTO  
10 EVIDENCE, PLAINTIFFS' EXHIBIT 545-4. AND YOU INDICATED TO HIM  
11 THAT THAT WAS A SCREEN SHOT OFF OF ORACLE'S CUSTOMER CONNECTION  
12 WEBSITE, CORRECT?

13 A. YES, IT IS.

14 (EXHIBIT DISPLAYED ON SCREEN.)

15 Q. IT'S UP HERE FOR THE JURY.

16 MR. COWAN: AND, YOUR HONOR, I AM A LITTLE WIDER  
17 THAN MR. HOWARD, AND A LITTLE TALLER. IF YOU CAN MAKE SURE  
18 THAT --

19 (LAUGHTER.)

20 THE COURT: ONLY SLIGHTLY.

21 LADIES AND GENTLEMEN, CAN YOU SEE THE SCREEN? CAN  
22 EVERYONE SEE THE SCREEN?

23 (NO RESPONSE.)

24 MR. COWAN: THANK YOU, YOUR HONOR.

25 ///

1 **BY MR. COWAN:**

2 **Q.** THIS IS A SCREEN SHOT FROM THE CUSTOMER CONNECTION  
3 WEBSITE, CORRECT?

4 **A.** SPECIFICALLY, YES, THE SOLUTION RESULT SCREEN. YES.

5 **Q.** IT WAS A SCREEN SHOT THAT WAS TAKEN SOMETIME AFTER  
6 SEPTEMBER OF 2009; WOULD YOU AGREE WITH ME ON THAT?

7 **A.** YES, I WOULD AGREE.

8 **Q.** AND YOU AGREE THAT TOMORROWNOW IS SHUT DOWN IN OCTOBER OF  
9 2008, RIGHT?

10 **A.** I BELIEVE SO.

11 **Q.** AND YOU TESTIFIED, AND I AM NOT QUIBBLING WITH YOU, I AM  
12 JUST TRYING TO MAKE SURE WE HAVE THE RECORD STRAIGHT --

13 **A.** UH-HUH.

14 **Q.** YOU TESTIFIED THAT THE "YES", "NO" BUTTON, THAT IS THE  
15 CALL OUT --

16 **MR. COWAN:** IF WE CAN GET THE CALL OUT AS WELL.

17 IT'S ON THE OTHER SIDE. RIGHT THERE, THAT CORNER, ALL THE WAY  
18 DOWN OVER TO THE RIGHT. RIGHT THERE.

19 **BY MR. COWAN:**

20 **Q.** YOU TESTIFIED THAT THE "YES," "NO" BUTTON WHERE IT SAYS,  
21 "DID THIS SOLVE YOUR PROBLEM," THAT THAT WAS THERE IN 2005 AS  
22 WELL?

23 **A.** YES.

24 **Q.** YOU ARE NOT REPRESENTING THAT ANYTHING ELSE ON THAT  
25 PARTICULAR PAGE, THE DOCUMENT WAS NECESSARILY THERE, THIS IS

1 JUST USED TO ILLUSTRATE THE "YES", "NO" BUTTON, CORRECT?

2 **A.** CAN YOU REPHRASE THE QUESTION?

3 **Q.** SURE.

4 **A.** BECAUSE THE STRUCTURE, IT'S PRETTY MUCH THE SAME.

5 **MR. COWAN:** LET'S GO BACK TO THE WHOLE DOCUMENT. IF  
6 YOU GO DOWN TO WHERE IT SAYS "ATTACHMENTS" RIGHT THERE AND  
7 HIGHLIGHT THAT.

8 **THE WITNESS:** OKAY.

9 **BY MR. COWAN:**

10 **Q.** THE DOCUMENT THAT THIS REFERS TO IS AN ATTACHMENT THAT  
11 SAYS JUNE 30, 2008, RIGHT?

12 **A.** YES.

13 **Q.** AND THE QUESTION EARLIER WAS, IS THIS AN ACCURATE  
14 REFLECTION OF THE "YES", "NO" BUTTONS, AND YOU SAID "YES".

15 **A.** UH-HUH.

16 **Q.** I AM NOT QUIBBLING WITH YOU ON THAT.

17 **A.** YEAH.

18 **Q.** THERE ARE OTHER ASPECTS OF THIS DOCUMENT THAT DON'T  
19 REPRESENT IT, RIGHT?

20 **A.** OKAY. I WOULD AGREE WITH THAT.

21 **Q.** THANK YOU.

22 AND, IN FACT, CUSTOMER CONNECTION WAS DISMANTLED,  
23 WAS IT NOT, IN FALL 2009?

24 **A.** WE UPGRADED IT TO OUR METALINK ENVIRONMENT. SO AS WE GOT  
25 ACQUIRED BY ORACLE WE UPGRADED IT TO THE LATEST INFORMATION,

1 WHICH IS ACTUALLY A LOT BETTER THAN ACTUALLY WHAT WE HAD WITH  
2 CUSTOMER CONNECTION.

3 Q. UNDERSTOOD.

4 BUT THE CUSTOMER CONNECTION WEBSITE THAT IS AT ISSUE  
5 IN THIS CASE, WAS TOTALLY DISMANTLED BY ORACLE AND NO LONGER  
6 EXISTS, CORRECT?

7 A. THE INFRASTRUCTURE WAS DISMANTLED, YES, BUT WE ACTUALLY  
8 MOVED OVER. SO ALL THOSE SOLUTION ID'S, THE CUSTOMER  
9 INFORMATION, ALL OF THAT WAS INTEGRATED AND MOVED INTO THE  
10 METALINK SYSTEM. SO ANYTHING THAT WAS CUSTOMER SPECIFIC, ANY  
11 OF OUR DOCUMENTS, ANY OF OUR BUGS AND FIXES, THAT WAS ALL MOVED  
12 INTO THE METALINK ENVIRONMENT.

13 Q. BUT TOMORROWNOW NEVER USED THIS ENVIRONMENT YOU'RE TALKING  
14 ABOUT IT WAS MOVED INTO BECAUSE IT WAS WOUND DOWN OVER A YEAR  
15 BEFORE THAT, RIGHT?

16 A. I GUESS THAT WOULD BE FAIR.

17 Q. OKAY.

18 MR. COWAN: NO FURTHER QUESTIONS, YOUR HONOR.

19 THE COURT: ANYTHING ELSE, MR. HOWARD?

20 MR. HOWARD: ONE SHORT QUESTION, YOUR HONOR.

21 **REDIRECT EXAMINATION**

22 BY MR. HOWARD:

23 Q. MS. RANSOM, MR. COWAN ASKED YOU ABOUT OTHER THIRD PARTY  
24 OPTIONS THAT MIGHT BE OUT THERE.

25 BETWEEN JANUARY 2005 AND OCTOBER 31, 2008, I WOULD

1 LIKE TO FOCUS YOU JUST ON JANUARY 2005. WAS THERE ANY OTHER  
2 COMPANY BESIDES TOMORROWNOW THAT YOU CONSIDERED A THREAT?

3 **A.** TOMORROWNOW WAS THE THREAT.

4 **MR. HOWARD:** YOUR HONOR, I BELIEVE I NEGLECTED TO  
5 MOVE THE ADMISSION OF PLAINTIFFS' EXHIBIT 545-4. I DO THAT  
6 NOW.

7 **THE COURT:** ALL RIGHT. ANY OBJECTION?

8 **MR. COWAN:** NO OBJECTION, YOUR HONOR.

9 **THE COURT:** ALL RIGHT, ADMITTED.

10 (PLAINTIFFS' EXHIBIT 545-4 RECEIVED IN  
11 EVIDENCE)

12 **THE COURT:** ANYTHING ELSE FROM YOU, MR. COWAN?

13 **MR. COWAN:** NO, YOUR HONOR.

14 **THE COURT:** AT THIS TIME WE ARE GOING TO TAKE OUR  
15 SECOND 15 MINUTE BREAK OF THE DAY. LADIES AND GENTLEMEN, YOU  
16 ARE EXCUSED FOR 15 MINUTES.

17 COUNSEL, I NEED TO SPEAK WITH YOU BRIEFLY.

18 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

19 **THE COURT:** JUST ONE THING.

20 WITH REGARD TO THE EXHIBITS THAT ARE GOING TO BE  
21 USED WITH WITNESSES, I WOULD LIKE THEM AFTER THEY ARE  
22 IDENTIFIED, I WOULD LIKE YOU TO MOVE THEM INTO EVIDENCE IF YOU  
23 ARE GOING TO PUBLISH THEM TO THE JURY. THEY SHOULD BE IN  
24 EVIDENCE BEFORE THEY ARE PUBLISHED.

25 **MR. COWAN:** AGREED, YOUR HONOR.

RANSOM - REDIRECT / MR. HOWARD

1           **MR. HOWARD:**   THANK YOU, YOUR HONOR.

2           **MR. COWAN:**   THERE WAS NO HARM, NO FOUL BECAUSE WE  
3   HAD ALREADY AGREED IN ADVANCE.

4           **THE COURT:**   NO, NO.   I WAS SPEAKING TO MR. HOWARD  
5   BECAUSE YOU WERE SIMPLY REPUBLISHING AN EXHIBIT THAT HAD  
6   ALREADY BEEN PUBLISHED.

7           **MR. HOWARD:**   WE HAD AGREED, YOUR HONOR --

8           **THE COURT:**   WELL, IF YOU ALL HAVE STIPULATED --

9           **MR. HOWARD:**   YES.

10          **THE COURT:**   -- TO THE ADMISSIBILITY OF EXHIBITS,  
11   JUST BEFORE YOU PUBLISH IT SAY, "WE STIPULATED TO IT AND WE  
12   WILL MARK IT AS AUTOMATICALLY ADMITTED.

13          **MR. HOWARD:**   VERY WELL, YOUR HONOR.

14          **THE COURT:**   OKAY?

15          **MR. HOWARD:**   THANK YOU, YOUR HONOR.

16                           (RECESS TAKEN AT 12:19 P.M.)

17                           (PROCEEDINGS RESUMED AT 12:38 P.M.)

18                           (PROCEEDINGS HELD IN THE PRESENCE OF THE JURY.)

19          **THE CLERK:**   PLEASE BE SEATED AND COME TO ORDER.

20          **THE COURT:**   ARE YOU READY WITH YOUR NEXT WITNESS?

21          **MR. HOWARD:**   THANK YOU, YOUR HONOR.   THE NEXT  
22   WITNESS ORACLE CALLS EDWARD SCREVEN.

23          **THE CLERK:**   RAISE YOUR RIGHT HAND.

24    ///

25                           **EDWARD SCREVEN,**

1 CALLED AS A WITNESS FOR THE PLAINTIFFS, HAVING BEEN DULY SWORN,  
2 TESTIFIED AS FOLLOWS:

3 **THE WITNESS:** YES, I DO.

4 **THE CLERK:** PLEASE BE SEATED.

5 **MR. HOWARD:** YOUR HONOR, MAY I APPROACH THE WITNESS  
6 AND PROVIDE HIS WITNESS BINDERS?

7 (BINDERS HANDED TO WITNESS.)

8 **THE CLERK:** PLEASE STATE YOUR FULL NAME AND SPELL  
9 YOUR LAST NAME FOR THE RECORD.

10 **THE WITNESS:** YES. MY NAME IS EDWARD SCREVEN. YOU  
11 SPELL MY LAST NAME S-C-R-E-V-E-N.

12 **DIRECT EXAMINATION**

13 **BY MR. HOWARD:**

14 **Q.** GOOD AFTERNOON, MR. SCREVEN. WHO IS YOUR CURRENT  
15 EMPLOYER?

16 **A.** ORACLE AMERICA.

17 **Q.** WHAT IS YOUR CURRENT POSITION?

18 **A.** MY TITLE IS CHIEF CORPORATE ARCHITECT.

19 **Q.** WHAT ARE YOUR RESPONSIBILITIES AS THE CHIEF CORPORATE  
20 ARCHITECT?

21 **A.** I HAVE SEVERAL RESPONSIBILITIES. ONE IS I NEED TO  
22 UNDERSTAND HOW OUR PRODUCTS ARE BUILT AND PUT TOGETHER AND TO  
23 PROVIDE TECHNICAL DIRECTION ACROSS THE ENGINEERING GROUPS THAT  
24 BUILD THE PRODUCTS TO MAKE SURE THAT ANY FUNCTIONALITY THAT  
25 WE'RE ADDING IS CONSISTENT WITH ORACLE'S STRATEGY.



1 I AM ALSO INVOLVED IN OUR MERGERS AND ACQUISITIONS  
2 PROCESS HELPING TO PERFORM TECHNICAL DUE DILIGENCE AND I'M ALSO  
3 RESPONSIBLE FOR SECURITY AT ORACLE. SO ALL OF OUR INTERNAL  
4 SECURITY.

5 Q. HOW LONG HAVE YOU WORKED AT ORACLE?

6 A. I HAVE WORKED AT ORACLE SINCE 1986.

7 Q. HOW WOULD YOU DESCRIBE ORACLE AS A COMPANY?

8 A. WE PROVIDE COMPUTER HARDWARE AND COMPUTER SOFTWARE TO  
9 ORGANIZATIONS AROUND THE WORLD. SO COMPANIES, CHARITIES AND  
10 GOVERNMENTS. WE ARE DIFFERENT THAN MANY OTHER IT COMPANIES IN  
11 THAT WE PROVIDE A FULL STACK OF SOFTWARE AND HARDWARE. SO WE  
12 CAN PROVIDE ESSENTIALLY EVERYTHING AN ORGANIZATION NEEDS TO RUN  
13 THEIR BUSINESS, OR THEIR GOVERNMENT, OR THEIR CHARITY.

14 Q. NOW YOU REFERRED TO A STACK. CAN YOU EXPLAIN WHAT THAT  
15 IS?

16 A. YES, I CAN. I BELIEVE WE HAVE A SLIDE THAT WOULD HELP  
17 EXPLAIN IT.

18 MR. HOWARD: SO THAT'S IN YOUR WITNESS BINDER AT  
19 TAB 1, YOUR HONOR. THIS IS DEMONSTRATIVE 1. AND THE  
20 DEMONSTRATIVES HAVE ALL BEEN AGREED TO BY THE PARTIES FOR THIS  
21 WITNESS.

22 CAN WE PUT THAT UP ON THE SCREEN, PLEASE?

23 (DOCUMENT DISPLAYED ON SCREEN.)

24 BY MR. HOWARD:

25 Q. ALL RIGHT. MR. SCREVEN, CAN YOU USE THE CHART THAT YOU'VE

1 PREPARED TO EXPLAIN WHAT YOU MEAN BY A TECHNOLOGY STACK?

2 **A.** YES, I CAN.

3 SO AT THE BOTTOM IS HARDWARE. SO HARDWARE MEANS,  
4 YOU KNOW, THE ACTUAL COMPUTERS, AND DISK DRIVES AND OTHER  
5 PHYSICAL COMPONENTS UPON WHICH THE SOFTWARE RUNS.

6 OPERATING SYSTEM IS SPECIALIZED SOFTWARE THAT HELPS  
7 OTHER SOFTWARE ACTUALLY USE THE HARDWARE. SO IF YOU ARE USED  
8 TO USING A PC OR A MACINTOSH, YOU HAVE EXPERIENCE WITH  
9 MICROSOFT WINDOWS OR MAC OSX. THOSE ARE OPERATING SYSTEMS FOR  
10 DESKTOPS.

11 NOW, LARGE ORGANIZATIONS FOR THEIR APPLICATIONS,  
12 THEIR BUSINESS APPLICATIONS USE OTHER OPERATING SYSTEMS LIKE  
13 UNIX AND/OR LINUX AND ALSO SOMETIMES WINDOWS. ORACLE IS IN THE  
14 BUSINESS OF ACTUALLY SUPPORTING BOTH LINUX AND AN OPERATING  
15 SYSTEM CALLED SOLARIS.

16 ABOVE THE OPERATING SYSTEM LAYER IS THE DATABASE  
17 LAYER. SO THE DATABASE IS A COMPLEX PROGRAM THAT STORES AND  
18 QUERIES AND PROCESSES VERY LARGE AMOUNTS OF DATA, VERY SECURELY  
19 AND VERY RELIABLY.

20 ABOVE THE DATABASE IS SOMETHING CALLED MIDDLEWARE.  
21 MIDDLEWARE IS A SPECIALIZED SOFTWARE THAT HELPS ORACLE AND OUR  
22 CUSTOMERS CREATE APPLICATIONS TO USE THOSE LAYERS THAT ARE  
23 BELOW.

24 NOW, THE APPLICATIONS ARE COMPLEX SOFTWARE THAT  
25 ACTUAL PEOPLE USE. SO, YOU KNOW, IF YOU, FOR EXAMPLE, FILL OUT

1 A TIME SHEET ON THE COMPUTER FOR YOUR EMPLOYER, THEN THAT TIME  
2 SHEET IS PART OF A HUMAN RESOURCES APPLICATION. IF YOUR JOB IS  
3 BEING A PURCHASING MANAGER, THEN THE APPLICATION THAT YOU USE  
4 TO LOOK AT PURCHASE REQUESTS THAT ARE COMING IN AND SUBMIT  
5 PURCHASE ORDERS GOING OUT, THAT'S PART OF A PURCHASING  
6 APPLICATION.

7 **Q.** ARE YOU FAMILIAR WITH ORACLE'S CLAIMS IN THIS CASE?

8 **A.** YES, I AM.

9 **Q.** WHAT PARTS OF THIS STACK THAT YOU HAVE JUST DESCRIBED  
10 RELATE TO THE PRODUCTS THAT ARE AT ISSUE IN THIS CASE?

11 **A.** THE APPLICATIONS LAYER AND THE DATABASE LAYER.

12 **Q.** SO LET'S FOCUS ON THOSE THEN.

13 CAN YOU TELL US A LITTLE BIT MORE ABOUT THE DATABASE  
14 LAYER?

15 **A.** THE DATABASE, THE ORACLE DATABASE --

16 **MR. HOWARD:** IF WE COULD, GO AHEAD AND PUT UP THE  
17 NEXT SLIDE.

18 (DOCUMENT DISPLAYED ON SCREEN.)

19 **THE WITNESS:** THANK YOU.

20 THE DATABASE WAS ORACLE'S FIRST PRODUCT. IT WAS THE  
21 FOUNDATION UPON WHICH WE BUILT THE REST OF THE COMPANY. IT IS  
22 BY FAR THE MARKET LEADING DATABASE IN THE WORLD. IT IS VERY  
23 SCALABLE. IT IS VERY SECURE AND VERY RELIABLE.

24 TO GIVE YOU SOME NOTION OF THE WAY ENTERPRISES USE  
25 THAT, YOU MAY WORK WITH SPREADSHEETS. SO YOU MAY BE USED TO

1 USING MICROSOFT EXCEL, AND A SPREADSHEET MAY HAVE A FEW TABS, A  
2 FEW SHEETS. THOSE SHEETS MAY HAVE A COUPLE OF HUNDRED ROWS IN  
3 THEM.

4 WELL, A LARGE ORGANIZATION LIKE A LARGE COMPANY OR A  
5 GOVERNMENT MAY HAVE APPLICATIONS WITH 10,000 TABLES. EACH  
6 TABLE, SOMETHING LIKE A SHEET ON A SPREADSHEET, AND INSTEAD OF  
7 A FEW HUNDRED ROWS, THEY MAY HAVE MILLIONS OR BILLIONS OF ROWS  
8 WITHIN THOSE TABLES. THAT IS JUST MASSIVE AMOUNTS OF DATA  
9 WHICH CAN BE STORED IN THE ORACLE DATABASE AND VERY QUICKLY  
10 RETRIEVED AND PROCESSED.

11 NOW, I MENTIONED THAT THE DATABASE IS RELIABLE. SO  
12 WHAT I MEAN BY THAT IS THE DATABASE CAN BE CONFIGURED IN SUCH A  
13 WAY THAT IF ANY OF THE UNDERLYING HARDWARE COMPONENTS FAILS,  
14 THE DATABASE KEEPS RUNNING AND THE BUSINESS OR GOVERNMENT OR  
15 CHARITY CONTINUES OPERATIONS.

16 IT IS ALSO VERY SECURE. THE DATABASE CAN BE  
17 CONFIGURED SO THAT IF ANY -- ONLY PEOPLE WHO ARE AUTHORIZED TO  
18 SEE A CERTAIN KIND OF DATA CAN ACTUALLY GET ACCESS TO THAT.

19 JUST TO GIVE YOU AN EXAMPLE OF THE USE OF THE  
20 DATABASE, THE NATIONAL MARROW DONOR PROGRAM, WHICH IS AN  
21 ORGANIZATION WHICH COLLECTS INFORMATION ABOUT POTENTIAL BONE  
22 MARROW DONORS AND PEOPLE WHO NEED IT YOU USE THE ORACLE  
23 DATABASE TO COLLECT -- THEY HAVE EIGHT MILLION DONOR RECORDS.

24 SO INFORMATION ABOUT EIGHT MILLION PEOPLE WHO ARE  
25 WILLING TO DONATE BONE MARROW AND EVERY DAY THEY EXECUTE 60,000

1 TRANSACTIONS TRYING TO MATCH POTENTIAL DONORS TO PEOPLE WHO  
2 NEED IT.

3 ANOTHER EXAMPLE IS ACTUALLY SAP ITSELF. SO SAP  
4 BUILDS A SUITE OF BUSINESS APPLICATIONS. THOSE BUSINESS  
5 APPLICATIONS RUN ON TOP OF THE ORACLE DATABASE. ALMOST ALL OF  
6 SAP'S LARGE CUSTOMERS ACTUALLY USE THE ORACLE DATABASE  
7 UNDERNEATH SAP APPLICATIONS.

8 **BY MR. HOWARD:**

9 **Q.** NOW MOVING UP IS THE STACK TO THE APPLICATIONS LAYER.

10 CAN YOU TELL US A LITTLE BIT MORE ABOUT THAT?

11 **A.** YES. THE ORACLE DATABASE IS VERY CAPABLE, BUT IT'S NOT  
12 ACTUALLY DESIGNED TO BE DIRECTLY USED BY A PERSON. AND SO  
13 INSTEAD, WHAT HAPPENS IS PEOPLE, COMPANIES BUILD APPLICATIONS  
14 THAT ACTUALLY SIT IN BETWEEN PEOPLE AND THE DATABASE.

15 SO, AN APPLICATION ACTUALLY PRESENTS USER INTERFACES  
16 ON THE COMPUTER SCREEN TO USERS DOING THEIR JOB. SO THAT WHAT  
17 AN APPLICATION DOES IS IT HELPS AUTOMATE BUSINESS TASKS,  
18 BUSINESS PROCESSES.

19 SO WE TALKED A LITTLE BIT ABOUT TIME SHEETS ALREADY  
20 IN A HUMAN RESOURCES APPLICATION, BUT IF I AM A MANUFACTURER, I  
21 CARE A LOT ABOUT MY SUPPLY CHAIN. SO MAKING SURE THAT ALL OF  
22 THE COMPONENTS THAT I NEED TO BUY AND HAVE SHIPPED INTO MY  
23 FACTORIES TO BE ASSEMBLED, MAKE SURE I KEEP TRACK OF ALL THOSE  
24 THINGS. DOING THAT BY HAND, OF COURSE, IS NOT PRACTICAL, SO I  
25 USE AN APPLICATION TO ACTUALLY PRESENT USER INTERFACES TO MY

1 EMPLOYEES WHO ACTUALLY MANAGE THAT SUPPLY CHAIN. THE  
2 APPLICATIONS THEN ACTUALLY TALK TO THE DATABASE TO STORE THE  
3 DATA AND QUERY THE DATA AND PROCESS THE DATA.

4 **Q.** YOU MENTIONED THAT THE DATABASE WAS ORACLE'S FIRST  
5 PRODUCT. WHY DID ORACLE GET INTO THE BUSINESS OF APPLICATION  
6 SOFTWARE?

7 **A.** AS I MENTIONED, ENTERPRISES HAVE VERY COMPLEX DATA  
8 MANAGEMENT REQUIREMENTS. SO, THERE'S A LOT OF BUSINESS  
9 PROCESSES THAT NEED TO BE AUTOMATED. OF COURSE, PURCHASING AND  
10 INVENTORY TRACKING, AND MY RELATIONSHIPS WITH MY CUSTOMERS AND  
11 MY RELATIONSHIPS WITH MY EMPLOYEES. THE DATABASE CAN STORE  
12 INQUIRY ALL KINDS OF DATA, BUT YOU NEED THAT SPECIALIZED  
13 FUNCTIONALITY TO AUTOMATE THOSE TASKS.

14 ADDITIONALLY, BUSINESSES AND GOVERNMENTS AND  
15 CHARITIES HAVE A LOT OF COMPLEX COMPLIANCE AND REPORTING  
16 REQUIREMENTS. TO THE GOVERNMENT, I HAVE TO REPORT VARIOUS  
17 ASPECTS. IF I AM A BANK, EVERYONE HAS TO PAY TAXES. IF I'M  
18 FROM A CHARITY, I HAVE TO FILE REPORTS BECAUSE I AM RECEIVING  
19 CHARITABLE DONATIONS.

20 SO USING APPLICATIONS HELP ENTERPRISES COMPLY WITH  
21 THE LAW AND COMPLY WITH REGULATIONS AROUND THE WORLD.

22 **Q.** WHAT APPLICATION PRODUCTS DOES ORACLE HAVE THAT ARE  
23 RELEVANT TO THIS CASE?

24 **A.** I THINK ON A SLIDE WE ACTUALLY HAVE THAT SHOWN.

25 (DOCUMENT DISPLAYED ON SCREEN.)

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1           THERE ARE THREE APPLICATION PRODUCT FAMILIES THAT  
2 ARE RELEVANT TO THIS CASE. THE FIRST IS PEOPLESOFT, THE SECOND  
3 IS SIEBEL, AND THE THIRD IS J.D. EDWARDS.

4   **Q.**   HOW MANY CUSTOMERS DOES ORACLE HAVE FOR ITS PRODUCTS?

5   **A.**   WE HAVE 370,000 CUSTOMERS AROUND THE WORLD.

6   **Q.**   WE HAVE BEEN TALKING ABOUT DIFFERENT TYPES OF SOFTWARE.

7           WHAT KIND OF RESOURCES ARE REQUIRED TO DEVELOP THE  
8 ENTERPRISE APPLICATION SOFTWARE SUCH AS PEOPLESOFT OR J.D.?

9   **A.**   VERY SUBSTANTIAL, MASSIVE. ORACLE'S RESEARCH AND  
10 DEVELOPMENT BUDGET FOR THIS FISCAL YEAR IS \$4 BILLION. WE ARE  
11 SPENDING \$4 BILLION BUILDING NEW PRODUCTS AND MAKING OUR  
12 EXISTING PRODUCTS BETTER.

13   **Q.**   IF YOU JUST HAD THAT AMOUNT OF MONEY, COULD YOU JUST, IN A  
14 SHORT AMOUNT OF TIME, BUILD AN ENTERPRISE APPLICATION PRODUCT?

15   **A.**   ABSOLUTELY NOT. THE PROCESS OF BUILDING AN ENTERPRISE  
16 SUITE OF APPLICATIONS IS LONG AND ARDUOUS. NO MATTER HOW MUCH  
17 MONEY YOU TRY TO THROW AT THE PROBLEM, NO MATTER HOW MANY  
18 PEOPLE YOU TRY TO HIRE AND BUILD THE APPLICATIONS, YOU COULD  
19 NOT DO IT IN A SHORT AMOUNT OF TIME.

20           AND THE REASON IS THAT THERE IS JUST A HUGE AMOUNT  
21 OF VERY SPECIALIZED KNOWLEDGE REQUIRED TO UNDERSTAND ALL OF THE  
22 REQUIREMENTS FOR THOUSANDS AND THOUSANDS OF CUSTOMERS AROUND  
23 THE WORLD OPERATING IN LOTS OF DIFFERENT LEGAL JURISDICTIONS,  
24 RIGHT, TO UNDERSTAND ALL OF THOSE REQUIREMENTS AND BUILD A CODE  
25 THAT'S -- THAT WILL ACTUALLY MEET THEIR REQUIREMENTS.

1 I MEAN, IT REALLY IS A PROCESS OF TRIAL AND ERROR.  
2 YOU TRY A SOLUTION, YOU TRY A CERTAIN SET OF FUNCTIONALITY,  
3 RIGHT, YOU GIVE IT TO CUSTOMERS, AND CUSTOMERS GIVE YOU  
4 FEEDBACK. SOMETIMES THE FEEDBACK IS GOOD, SOMETIMES THE  
5 FEEDBACK IS BAD. THIS DOESN'T WORK FOR ME. THIS DOESN'T  
6 SATISFY MY REQUIREMENTS. THEREFORE, YOU NEED TO TRY AGAIN.

7 YOU NEED TO CHANGE THE WAY THE APPLICATION WORKS.  
8 YOU NEED TO ADD SOME MORE FUNCTIONALITY. IT TAKES A LONG TIME  
9 NO MATTER HOW MUCH MONEY YOU PUT AT IT, IT TAKES A LONG TIME TO  
10 BUILD OUT A COMPLETE VIABLE SOLUTION FOR CUSTOMERS IN THE  
11 APPLICATION SPACE.

12 **Q.** YOU KNOW, YOU MENTIONED A \$4 BILLION RESEARCH AND  
13 DEVELOPMENT BUDGET. THAT'S A LOT OF MONEY. WHERE DOES ORACLE  
14 GET THAT MONEY TO DEVELOP AND CREATE ITS PRODUCTS?

15 **A.** SO, AS I MENTIONED, WE HAVE 370,000 CUSTOMERS AROUND THE  
16 WORLD. NOW, THOSE CUSTOMERS, OF COURSE, HAVE PAID US MONEY TO  
17 HAVE THE RIGHT TO USE THAT SOFTWARE, BUT THEY ALSO SUBSCRIBE TO  
18 SUPPORT. SO THEY PAY US FOR SUPPORT.

19 THEY PAY US AN ANNUAL FEE IN ORDER TO BE ABLE TO ASK  
20 US QUESTIONS, REPORT PROBLEMS, AND MOST IMPORTANTLY GET UPDATES  
21 TO THAT SOFTWARE. SO GET FIXES TO BUGS, GET NEW FUNCTIONALITY,  
22 YOU KNOW, GET INFORMATION FROM US ABOUT HOW TO USE THE SOFTWARE  
23 MORE EFFECTIVELY.

24 **Q.** DO YOU HAVE PERSONAL EXPERIENCE WITH THE TYPE OF EFFORT  
25 REQUIRED TO DEVELOP ENTERPRISE APPLICATION SOFTWARE?



1     **A.**     YES.   YES.   I WAS A FOUNDING MEMBER OF ORACLE'S  
2     APPLICATION'S DIVISION.   SO WHILE IT IS NOT DEPICTED ON THIS  
3     SCREEN, WE HAVE ANOTHER FAMILY OF PRODUCTS CALLED THE E  
4     BUSINESS SUITE.

5                 SO I WAS ONE OF THE VERY FIRST EMPLOYEES THAT ORACLE  
6     HIRED TO ACTUALLY BUILD APPLICATIONS.   SO WHAT I DID, I BUILT  
7     OUT TECHNOLOGY PIECES WHICH WERE THEN USED BY THE REST OF THE  
8     PROGRAMMERS TO BUILD OUT THE E BUSINESS SUITE.

9                 I CAN TELL YOU, IT'S A VERY -- IT WAS A VERY  
10    DIFFICULT AND CHALLENGING PROCESS.   I MEAN, WE HAD FOLKS ON  
11    STAFF WHO UNDERSTOOD THE BUSINESS PROBLEMS.   THEY UNDERSTOOD  
12    GENERALLY WHAT THE FUNCTIONALITY NEEDED TO BE, BUT WE WERE  
13    LITERALLY STARTING WITH BLANK PIECES OF PAPER AND EMPTY  
14    SCREENS.

15                AND IT WAS A LOT OF WORK THAT STARTED OFF WITH TENS  
16    OF PEOPLE, THEN HUNDREDS OF PEOPLE, THEN THOUSANDS OF PEOPLE TO  
17    BE ABLE TO BUILD OUT THE E BUSINESS SUITE.

18                AND, YOU KNOW, AS I SAID BEFORE, IT WAS VERY  
19    ITERATIVE.   I MEAN, IT WAS A PROCESS WHEREBY WE BUILT  
20    FUNCTIONALITY.   WE TRIED IT OUT.   WE GAVE IT TO CUSTOMERS.  
21    THEY SAID, THIS DOESN'T WORK FOR US.   SO THAT MEANT WE HAD TO  
22    THROW SOME CODE AWAY AND START AGAIN.

23                THE GOOD NEWS IS THROUGH THAT ITERATION, WE WERE  
24    ABLE TO BUILD UP VERY COMPELLING OFFERING FOR CUSTOMERS, YOU  
25    KNOW, SOMETHING THAT HELPED THEM VERY MUCH.   BUT THE BAD NEWS

1 IS IT TOOK A LONG TIME.

2 Q. IN A NUTSHELL, HOW DOES ORACLE DEVELOP ITS SOFTWARE?

3 A. I THINK THERE IS THE NEXT SLIDE WILL ACTUALLY SHOW US THE  
4 GENERAL PROCESS THAT WE FOLLOW.

5 MR. HOWARD: YOUR HONOR, THAT'S PD 3, PLAINTIFFS'  
6 DEMONSTRATIVE 3.

7 (DOCUMENT DISPLAYED ON SCREEN.)

8 BY MR. HOWARD:

9 Q. DOES THAT HELP YOU EXPLAIN THE DEVELOPMENT PROCESS OF THE  
10 ORACLE SOFTWARE?

11 A. YES, IT DOES.

12 Q. PLEASE PROCEED.

13 A. SO, ROUGHLY SPEAKING, IN GENERAL, THERE ARE FOUR PHASES TO  
14 THE WAY WE BUILD OUR SOFTWARE.

15 IN THE FIRST PHASE IS DESIGN. DESIGN IS WHEN WE  
16 THINK ABOUT WHAT IS THE FUNCTIONALITY WE WANT TO ADD, WHAT ARE  
17 THE REQUIREMENTS THAT WE ARE TRYING TO SATISFY. TECHNICALLY,  
18 HOW IS IT WE ARE ACTUALLY GOING TO ENGINEER IT AND PUT IT  
19 TOGETHER.

20 THE SECOND PHASE IS DEVELOPMENT. SO THAT'S WHERE WE  
21 TAKE OUR DESIGNS AND WE ACTUALLY CODE THINGS. WE SIT IN FRONT  
22 OF SCREENS AND WRITE COMPUTER PROGRAMS.

23 THE THIRD PHASE IS TESTING. SO WE HAVE LARGE FARMS,  
24 BASICALLY BIG COLLECTIONS OF COMPUTERS THAT WE USE TO  
25 AUTOMATICALLY RUN OUR SOFTWARE AND TEST OUR SOFTWARE. WE HAVE

1 EMPLOYEES WHOSE JOB IT IS TO TEST AND USE THE SOFTWARE AND MAKE  
2 SURE THAT IT SEEMS TO BE -- THE IMPLEMENTATION THAT WE DID IN  
3 DEVELOPMENT MATCHES THE DESIGN.

4 AND, FINALLY, WE RELEASE OUR SOFTWARE. SO RELEASING  
5 MEANS THAT WE COLLECT TOGETHER THE CODE THAT WE HAVE WRITTEN,  
6 PUT IT TOGETHER, AND SOMETHING THAT CAN BE INSTALLED BY  
7 CUSTOMERS AND WE GIVE IT TO CUSTOMERS.

8 NOW, ALL THROUGHOUT THAT CYCLE THERE IS CUSTOMER  
9 FEEDBACK. SO, WE HAVE WHAT WE CALL CUSTOMER ADVISORY BOARDS  
10 WHERE WE TALK TO CUSTOMERS ABOUT WHAT WE INTEND TO BUILD, WHAT  
11 THEIR REQUIREMENTS ARE. WE HAVE CUSTOMERS COME IN AND USE THE  
12 SOFTWARE BEFORE WE RELEASE IT TO TRY TO GET THEIR EARLY  
13 FEEDBACK. OF COURSE, ONCE WE RELEASE IT TO CUSTOMERS, WE GET A  
14 LOT OF FEEDBACK. WHAT'S THEIR IMPRESSION? WHAT ARE THE BUGS  
15 THAT WE MISSED IN TESTING? WHAT IS IT THAT WE SHOULD DO DURING  
16 THE NEXT RELEASE?

17 TO GIVE YOU SOME IDEA OF THE SCALE OF CUSTOMER  
18 INVOLVEMENT IN ORACLE'S PROCESSES, EVERY YEAR WE RUN A LARGE  
19 CONFERENCE IN SAN FRANCISCO. IT'S CALLED ORACLE OPEN WORLD.  
20 SO AT ORACLE OPEN WORLD THIS YEAR, WE HAD 41,000 CUSTOMERS COME  
21 IN ORDER TO BE ABLE TO LISTEN TO US, TALK ABOUT WHAT WE PLAN TO  
22 DO IN OUR PRODUCTS, AND TELL US WHAT THEY WOULD LIKE TO DO WITH  
23 OUR PRODUCTS, AND MAYBE MOST IMPORTANTLY TALK TO EACH OTHER  
24 ABOUT THEIR EXPERIENCE IN USING OUR SOFTWARE AND HOW TO USE IT  
25 MORE EFFECTIVELY.

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1 Q. YOU MENTIONED THAT ORACLE HAS 370,000 CUSTOMERS. DOES THE  
2 SIZE OF THE CUSTOMER BASE MATTER FROM A DEVELOPMENT  
3 PERSPECTIVE?

4 A. IT ABSOLUTELY DOES. I MEAN, IT MEANS THAT WE HAVE A VERY  
5 BROAD SET OF FOLKS TELLING US WHAT THE REQUIREMENTS ARE. I  
6 MEAN, OUR SOFTWARE IS MUCH BETTER BECAUSE WE HAVE ALL OF THOSE  
7 CUSTOMERS TELLING US HOW TO MAKE IT BETTER.

8 IT'S WHEN YOU START OFF AND YOU HAVE NO CUSTOMERS, I  
9 MEAN, FRANKLY, YOU ARE GUESSING ABOUT WHAT CUSTOMERS WANT AND  
10 WHAT CUSTOMERS NEED. WHEN YOU HAVE A LARGE CUSTOMER BASE, YOU  
11 GET A LOT OF VERY HELPFUL DIRECTION FROM THEM TO TELL YOU WHAT  
12 YOU SHOULD BUILD.

13 MR. HOWARD: WE CAN TAKE THAT ONE DOWN, PLEASE.

14 BY MR. HOWARD:

15 Q. MR. SCREVEN, DOES ORACLE DO ANYTHING TO PROTECT THIS  
16 MULTIBILLION DOLLAR INVESTMENT IN ITS PRODUCTS?

17 A. YES, WE DO. COMPUTER SOFTWARE IS INTELLECTUAL PROPERTY  
18 AND WE TAKE EVERY STEP AVAILABLE TO US UNDER THE LAW TO PROTECT  
19 OUR INTELLECTUAL PROPERTY.

20 AND CERTAINLY ONE OF THE MOST IMPORTANT WAYS IS  
21 THROUGH COPYRIGHTS. NOW, COPYRIGHTS ARE SOMETHING THAT WE DO  
22 AS A MATTER OF COURSE IN OUR BUSINESS, AND ADDITIONALLY WE HAVE  
23 A LARGE LEGAL STAFF, AND A GOOD FRACTION OF THEIR TIME IS  
24 ACTUALLY SPENT MAKING SURE THAT OUR SOFTWARE IS COPYRIGHTED.

25 Q. WHY IS IT IMPORTANT FOR COMPANIES LIKE ORACLE TO PROTECT

1 ITS SOFTWARE WITH COPYRIGHTS?

2 **A.** WELL, WE TALKED A FEW MINUTES AGO ABOUT THE WAY WE FUND  
3 OUR DEVELOPMENTS. IT'S BASICALLY PAID FOR BY THE MONEY THAT  
4 OUR CUSTOMERS PAY US, ESPECIALLY THE MONEY THAT OUR CUSTOMERS  
5 PAY US FOR SUPPORT.

6 NOW, IF OTHER COMPANIES COULD JUST TAKE OUR  
7 INTELLECTUAL PROPERTY AND GIVE IT TO OTHER PEOPLE, THEN WE  
8 WOULDN'T HAVE THAT SUPPORT REVENUE. WE WOULDN'T HAVE THOSE  
9 LICENSE FEES. WE WOULDN'T ACTUALLY BE ABLE TO PAY ALL THOSE  
10 PROGRAMMERS THAT WE PAY TO MAKE OUR SOFTWARE BETTER AND TO  
11 INNOVATE.

12 WHEN I FIRST JOINED ORACLE IN '86, ORACLE WAS A  
13 SMALL COMPANY WITH BASICALLY ONE PRODUCT. RIGHT? TODAY,  
14 ORACLE IS A MUCH LARGER COMPANY WITH MANY, MANY PRODUCTS. AND  
15 THAT CORE INITIAL DATABASE PRODUCT, ORACLE DATABASE, IS MUCH  
16 MORE POWERFUL AND MUCH MORE SOPHISTICATED.

17 IF ORACLE DID NOT HAVE INTELLECTUAL PROPERTY RIGHTS,  
18 THEN THERE IS NO WAY THAT ORACLE COULD HAVE PAID FOR THE  
19 ENGINEERING TO MAKE THE ORACLE DATABASE WHAT IT IS TODAY TO  
20 BUILD THE ADDITIONAL PRODUCTS THAT WE BUILD TODAY.

21 **Q.** DO YOU RUN ACROSS ORACLE'S COPYRIGHT PROTECTION EFFORTS IN  
22 THE COURSE OF YOUR JOB?

23 **A.** YES, YES, YES. ALL THE TIME. SO INSIDE ORACLE, OF  
24 COURSE, EVERY TIME WE PRODUCE A CD OR DVD WITH OUR SOFTWARE IN  
25 IT IT'S STAMPED WITH THE COPYRIGHT.

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1 EVERY TIME WE HAVE A DOCUMENT WHICH WE GIVE TO  
2 CUSTOMERS, IT HAS A COPYRIGHT NOTICE IN IT. ON OUR WEBSITE ARE  
3 OUR COPYRIGHT NOTICES. IN OUR CODE IS COPYRIGHT NOTICES.

4 AS A PROGRAMMER, IF I LOOK AT AN ORACLE SOURCE FILE,  
5 I WILL SEE AN ORACLE COPYRIGHT NOTICE. IT'S PART OF WHAT WE DO  
6 EVERY SINGLE DAY.

7 **Q.** MR. SCREVEN, I WOULD LIKE TO SHOW YOU A CD.

8 **MR. HOWARD:** YOUR HONOR, THIS HAS BEEN -- IS  
9 EXHIBIT -- PLAINTIFFS' EXHIBIT 2115-1. IT HAS BEEN STIPULATED  
10 INTO EVIDENCE. IT IS AN ORIGINAL CD.

11 MAY I APPROACH THE WITNESS TO HAND IT TO HIM?

12 (EXHIBIT HANDED TO WITNESS.)

13 (PLAINTIFFS' EXHIBIT 2115-1 RECEIVED IN  
14 EVIDENCE)

15 **THE COURT:** MR. SCREVEN, CAN I ASK YOU TO SLOW DOWN  
16 JUST A LITTLE BIT.

17 **THE WITNESS:** I'M SORRY, YOUR HONOR.

18 THIS IS A CD WHICH CONTAINS ORACLE DATABASE 10G.  
19 THIS SPECIFIC VERSION OF IT CALLED 102010. IT CAN BE USED TO  
20 STORE THE ORACLE DATABASE.

21 **BY MR. HOWARD:**

22 **Q.** DOES THAT HAVE ANY RELATION TO THE PRODUCTS WHICH THE  
23 DEFENDANTS HAVE STIPULATED TO INFRINGING?

24 **A.** YES, IT DOES. IT'S ONE OF THE VERSIONS OF THE ORACLE  
25 DATABASE THEY HAVE STIPULATED TO INFRINGING.

1 Q. I THINK WE CAN SHOW THAT ON THE SCREEN.

2 (EXHIBIT DISPLAYED ON SCREEN.)

3 IS THAT AN IMAGE OF THE CD, THE ORIGINAL CD YOU HAVE  
4 THERE IN THE PLASTIC SLEEVE?

5 A. YES.

6 Q. ALL RIGHT.

7 DOES THIS CD BEAR THE TYPE OF COPYRIGHT NOTICE THAT  
8 YOU WERE DESCRIBING JUST A MOMENT AGO THAT ORACLE PUTS ON ITS  
9 PRODUCTS?

10 A. YES, IT DOES. ALONG THE BOTTOM YOU CAN SEE A COPYRIGHT  
11 NOTICE WHICH IS VERY SIMILAR TO WHAT APPEARS IN, YOU KNOW, ON  
12 OTHER ORACLE CD'S AND OUR DOCUMENTATION AND OUR SOURCE CODE.

13 Q. DOES ORACLE HAVE --

14 MR. HOWARD: THANK YOU. YOU CAN TAKE THAT DOWN.

15 BY MR. HOWARD:

16 Q. DOES ORACLE HAVE OTHER ASSETS THAT ARE VALUABLE BESIDES  
17 ITS INTELLECTUAL PROPERTY?

18 A. WELL, WE HAVE BUILDINGS AND WE HAVE COMPUTERS AND TABLES  
19 AND CHAIRS, ALL THOSE THINGS, BUT NONE OF THEM ARE -- NONE OF  
20 THEM ARE UNIQUE TO ORACLE. I MEAN, EVERYONE HAS THOSE THINGS.  
21 AND YOU KNOW THEY ARE VERY DIFFERENT THAN INTELLECTUAL  
22 PROPERTY.

23 I MEAN, IF SOMEHOW ALL OF THAT PHYSICAL PROPERTY,  
24 LIKE COMPUTERS AND BUILDINGS AND TABLES AND CHAIRS WERE TO GO  
25 AWAY, WE COULD REPLACE IT. WE COULD BUY NEW ONES. WE WOULD

1 STILL BE IN BUSINESS.

2 IF OUR INTELLECTUAL PROPERTY DISAPPEARED? WE WOULD  
3 BE OUT OF BUSINESS. IT IS THE SAME FOR US. SAME FOR US AND  
4 MANY OTHER IT COMPANIES. OUR BUSINESS IS OUR INTELLECTUAL  
5 PROPERTY.

6 **Q.** DOES ORACLE LICENSE ITS SOFTWARE?

7 **A.** WE DO LICENSE OUR SOFTWARE.

8 **Q.** AND HOW DOES THAT -- WHAT FORM DOES THAT LICENSE TAKE?

9 **A.** IT DEPENDS ON THE PRODUCT.

10 SO, FOR EXAMPLE, A CUSTOMER WHO WISHES TO USE THE  
11 ORACLE DATABASE, PURCHASES FROM ORACLE A LICENSE USUALLY TO RUN  
12 THE COMPUTER ON SOME NUMBER OF PROCESSORS. SO IF I HAVE GOT 20  
13 COMPUTERS IN MY COMPANY AND I WANT TO RUN THE ORACLE DATABASE  
14 ON THOSE 20 COMPUTERS, I BUY FROM ORACLE THE RIGHT TO USE THE  
15 DATABASE ON THOSE 20 COMPUTERS.

16 **Q.** HOW IS THE FEE PAID; IS IT UP FRONT OR IS IT OVER TIME?

17 **A.** IT'S PAID UP FRONT.

18 **Q.** DO YOU EVER JUST GIVE THE CUSTOMER THE SOFTWARE AND WAIT  
19 AND SEE HOW THEY USE IT?

20 **A.** NO. THE CUSTOMER'S OBLIGATED TO PAY US FOR THE SOFTWARE  
21 THAT THEY ARE GOING TO USE. THEY DON'T JUST PAY US FOR THE  
22 SOFTWARE THEY FEEL LIKE PAYING US FOR.

23 **Q.** WHAT HAPPENS IF THEY DON'T USE IT AS MUCH AS THEY ARE  
24 EXPECTING TO WHEN YOU ARE ASKING THEM FOR THE LICENSE FEE?

25 **A.** THEY HAVE ALREADY BOUGHT IT. I MEAN, IF I GO TO THE



1 GROCERY STORE AND I BUY FOUR LOAVES OF BREAD AND I ONLY USE TWO  
2 OF THEM, THE GROCERY STORE DOESN'T GIVE ME MY MONEY BACK.

3 THE SAME WITH ORACLE. IF YOU BUY LICENSES THAT LET  
4 YOU RUN THE ORACLE DATABASE ON 20 COMPUTERS, AND YOU ONLY WIND  
5 UP RUNNING IT ON 10, YOU KNOW, YOU STILL HAVE THE RIGHT TO USE  
6 THE DATABASE ON TEN MORE COMPUTERS, AND MAYBE SOME DAY YOU  
7 WILL.

8 **Q.** ALL RIGHT.

9 MR. SCREVEN, WOULD YOU PLEASE LOOK IN YOUR WITNESS  
10 BINDER THERE ON THE PODIUM AT TAB 4, THAT'S JTX-2, JOINT TRIAL  
11 EXHIBIT 2.

12 **MR. HOWARD:** YOUR HONOR, THIS IS ATTACHMENT A TO THE  
13 TRIAL STIPULATION AND ORDER NUMBER 3 IN THE JURY NOTEBOOK. AND  
14 THAT ATTACHMENT A STARTS AT PAGE 8 OF THAT TAB.

15 **THE WITNESS:** I AM SORRY, WHICH BINDER AGAIN?

16 **BY MR. HOWARD:**

17 **Q.** YOU SHOULD BE LOOKING IN THE SMALL WITNESS BINDER.

18 **A.** OKAY.

19 **Q.** TAB 4?

20 **A.** THANK YOU.

21 SO THIS --

22 **Q.** ARE YOU FAMILIAR WITH THAT DOCUMENT?

23 **A.** YES, I AM FAMILIAR WITH THIS.

24 THIS IS A LIST OF COPYRIGHT REGISTRATIONS THAT THE  
25 DEFENDANTS HAVE ADMITTED TO INFRINGING.

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1 Q. HOW MANY OF THEM ARE THERE IN TOTAL?

2 A. THERE ARE 120.

3 Q. ARE YOU FAMILIAR WITH THE REGISTRATIONS ON THAT LIST?

4 A. YES, I AM. I HAVE REVIEWED THE REGISTRATIONS ALONG WITH  
5 DEPOSIT MATERIAL ASSOCIATED WITH THEM.

6 Q. NOW, MR. SCREVEN, I WOULD LIKE YOU TO LOOK AT THE SECOND  
7 BINDER ON YOUR DESK.

8 MR. HOWARD: YOUR HONOR, THAT IS THE BINDER ITSELF  
9 IS PLAINTIFFS' TRIAL EXHIBIT 4813. THAT HAS BEEN STIPULATED  
10 INTO EVIDENCE AS WELL.

11 (PLAINTIFFS' EXHIBIT 4813 RECEIVED IN  
12 EVIDENCE)

13 BY MR. HOWARD:

14 Q. MR. SCREVEN, DO YOU RECOGNIZE THE CONTENTS OF PLAINTIFFS'  
15 TRIAL EXHIBIT 4813? THAT'S THIS LARGE BINDER THAT YOU HAVE  
16 THERE IN FRONT OF YOU.

17 A. YES. YES, I DO. THESE ARE THE VARIOUS FORMS THAT ARE  
18 FILED AS PART OF, YOU KNOW, REGISTERING THOSE COPYRIGHTS.

19 Q. WHAT DO YOU RECOGNIZE THE CONTENTS OF THAT BINDER TO BE?

20 A. I RECOGNIZE THEM TO BE THE ACTUAL REGISTRATIONS OF  
21 COPYRIGHTS THAT DEFENDANTS HAVE ADMITTED TO INFRINGING.

22 Q. ARE THERE 120 OF THEM?

23 A. YES, THERE ARE 120 OF THEM.

24 Q. ARE YOU FAMILIAR WITH THE PRODUCTS THAT ARE LISTED HERE IN  
25 THE LIST OF REGISTRATIONS?

1     **A.**     YES, I AM.

2     **Q.**     WOULD YOU EXPLAIN GENERALLY WHAT THOSE PRODUCTS ARE?

3     **A.**     CERTAINLY. I THINK WE HAVE A SLIDE THAT WILL HELP DEPICT  
4     THAT.

5     **Q.**     ALL RIGHT.

6                 SO, MR. SCREVEN, BEFORE WE PUT THE SLIDE UP, JUST  
7     GIVE US A GENERAL OVERVIEW OF WHAT THE PRODUCTS ARE.

8     **A.**     THEY ARE BASICALLY THE APPLICATION FAMILIES THAT WE HAVE  
9     DESCRIBED. SO PEOPLESOFT AND J.D. EDWARDS AND SIEBEL, AS WELL  
10    AS THE ORACLE DATABASE. AND THERE ARE MULTIPLE VERSIONS OF  
11    THOSE.

12                SO WHEN WE RELEASE SOFTWARE TO CUSTOMERS, EACH  
13    RELEASE OF A GIVEN PRODUCT FAMILY, WE IDENTIFY BY VERSION  
14    NUMBER. SO AMONG THESE COPYRIGHT REGISTRATIONS ARE COPYRIGHTS  
15    FOR DIFFERENT VERSIONS OF SOME OF THOSE PRODUCTS.

16    **Q.**     SO NOW YOU'VE PREPARED A CHART TO HELP YOU EXPLAIN WHAT  
17    THESE DIFFERENT PRODUCTS ARE?

18    **A.**     YES.

19    **Q.**     AND THAT'S AT YOUR WITNESS BINDER IN TAB 5.

20                **MR. HOWARD:** YOUR HONOR, THAT'S PLAINTIFFS'  
21    DEMONSTRATIVE 5.

22    **BY MR. HOWARD:**

23    **Q.**     WHAT DOES THIS SHOW?

24    **A.**     THIS SHOWS THE FOUR PRODUCT FAMILIES FOR WHICH THERE ARE  
25    COPYRIGHT REGISTRATIONS THAT THE DEFENDANTS HAVE ADMITTED TO

1 INFRINGING.

2 Q. ALL RIGHT. WHAT ARE THOSE PRODUCTS?

3 A. PEOPLESOFT, J.D. EDWARDS, SIEBEL AND THE ORACLE DATABASE.

4 Q. NOW, WHAT CAN YOU TELL US ABOUT THE PEOPLESOFT PRODUCT  
5 FAMILY AND THE PRODUCTS WITHIN IT THAT ARE REPRESENTED THERE IN  
6 THE LIST OF 120 REGISTRATIONS?

7 A. WELL, IF WE GO TO ANOTHER SLIDE, I THINK --

8 Q. THAT'S PLAINTIFFS' DEMONSTRATIVE 6 IS THE NEXT SLIDE?

9 (DOCUMENT DISPLAYED ON SCREEN.)

10 A. SO THE FUNCTIONALITY THAT'S -- THAT CORRESPOND TO THE  
11 COPYRIGHT REGISTRATIONS WHICH ARE IN THIS BINDER, FALL INTO  
12 SEVERAL CATEGORIES.

13 SO ONE CATEGORY IS HR. HRMS OR SOMETIMES ALSO  
14 CALLED HUMAN CAPITAL MANAGEMENT. SO THAT'S THE PART OF THE  
15 APPLICATIONS THAT HELP A GOVERNMENT, CHARITY OR BUSINESS MANAGE  
16 ITS EMPLOYEES. THINGS LIKE PAYROLL AND VACATION TIME AND THEIR  
17 SKILLS.

18 THE NEXT BUCKET IS FINANCIALS AND SUPPLY CHAIN  
19 MANAGEMENT. SO THAT'S ALL ABOUT HELPING ENTERPRISES MANAGE  
20 THEIR MONEY, KEEP TRACK OF ACCOUNTS AND ALSO MANAGE THEIR  
21 SUPPLY CHAIN WHICH WE MENTIONED A LITTLE BIT EARLIER.

22 THE NEXT BUCKET IS CRM, CUSTOMER RELATIONSHIP  
23 MANAGEMENT. IF I HAVE CUSTOMERS, I WANT TO KEEP TRACK OF THOSE  
24 CUSTOMERS, WHO THEY ARE, WHAT ARE MY INTERACTIONS WITH THEM.

25 ACTUALLY, IT'S NOT JUST BUSINESSES. SOMETIMES

1 GOVERNMENTS USE CRM, TOO, BECAUSE THEY TREAT THEIR  
2 CONSTITUENTS, THEIR CITIZENS AS THEIR CUSTOMERS.

3 THE NEXT CATEGORY IS ENTERPRISE PERFORMANCE  
4 MANAGEMENT, EPM. IT'S A WAY TO SET GOALS FOR THEMSELVES AND  
5 THEN TRACK HOW WELL THEY ARE DOING AGAINST THOSE GOALS.

6 THE NEXT IS STUDENT ADMINISTRATION. STUDENT  
7 ADMINISTRATION IS A KIND OF SPECIALIZED HUMAN RESOURCES  
8 MANAGEMENT. IT'S FOR COLLEGES AND UNIVERSITIES TO MANAGE THEIR  
9 STUDENT ENVIRONMENT.

10 PEOPLE TOOLS IS ACTUALLY NOT AN APPLICATION ITSELF,  
11 RATHER IT'S A COLLECTION OF TECHNOLOGY THAT'S USED TO RUN,  
12 BUILD AND RUN THE APPLICATIONS THAT ARE RUNNING ON TOP OF IT.

13 AND, FINALLY, THERE ARE UPDATES AND SUPPORT  
14 MATERIALS. SO, THOSE ARE THINGS LIKE BUG FIXES, OR NOTICES  
15 ABOUT CHANGES THAT ARE GOING TO EFFECT CUSTOMERS OR INFORMATION  
16 ABOUT HOW TO USE THE SOFTWARE MORE EFFECTIVELY.

17 **Q.** ARE ALL OF THOSE REFLECTED IN THE LIST OF 120  
18 REGISTRATIONS?

19 **A.** YES, THEY ARE ALL REFLECTED WITHIN THE LIST OF 120  
20 REGISTRATIONS.

21 **Q.** NOW, IF LOOKING AT THE NEXT SLIDE, IF WE COULD, CAN YOU  
22 TELL US JUST BRIEFLY ABOUT THE J.D. EDWARDS PRODUCTS THAT ARE  
23 THERE?

24 **A.** YES. SO, J.D. EDWARDS -- ACTUALLY WITHIN J.D. EDWARDS  
25 THERE ARE ACTUALLY TWO SUBLINES. ONE IS CALLED J.D. EDWARDS

SCREVEN - DIRECT / MR. HOWARD

1 WORLD AND THE OTHER ONE IS CALLED J.D. EDWARDS ENTERPRISE ONE.

2 NOW YOU'LL NOTICE THE BOXES ARE VERY SIMILAR. THEY  
3 ADDRESS MANY OF THE SAME FUNCTIONAL AREAS THAT THE PEOPLESOFT  
4 PRODUCTS DO. JUST IDENTIFYING A COUPLE OF THEM WHICH ARE  
5 SPECIFIC TO J.D. EDWARDS.

6 ONE IS ASSET MANAGEMENT. SO ASSET MANAGEMENT IS ALL  
7 ABOUT HOW MANUFACTURER OPTIMIZES THEIR USE OF THEIR PHYSICAL  
8 PLANTS. SO THEIR FACTORIES AND THE MACHINES WITHIN THOSE  
9 FACTORIES.

10 YOU KNOW ANOTHER ONE IS, WELL, PROJECT MANAGEMENT.  
11 SO PROJECT MANAGEMENT IS AN APPLICATION THAT HELPS  
12 ENTERPRISES -- THEY'RE DOING COMPLEX PROJECTS. SO I HAVE A LOT  
13 OF PEOPLE AND RESOURCES THAT ARE DEDICATED TO ACCOMPLISH SOME  
14 TASK. HOW CAN I MANAGE ALL THOSE RESOURCES AND PEOPLE AND GET  
15 THE JOB DONE.

16 **Q.** WITHIN THE PRODUCTS THAT YOU'VE JUST DESCRIBED FOR  
17 PEOPLESOFT AND J.D. EDWARDS, ARE THEIR ONES THAT ARE  
18 PARTICULARLY SIGNIFICANT OR DESIRABLE TO ORACLE AT THE TIME  
19 THAT IT ACQUIRED PEOPLESOFT?

20 **A.** YES. DEFINITELY. SO PEOPLESOFT WAS AND IS ACTUALLY STILL  
21 VERY WELL-KNOWN FOR ITS HUMAN RESOURCES MANAGEMENT CAPABILITY.

22 J.D. EDWARDS IS WELL-KNOWN FOR BEING VERY  
23 APPROPRIATE FOR MID-SIZE COMPANIES AND ALSO ESPECIALLY MID-SIZE  
24 MANUFACTURING COMPANIES.

25 **Q.** YOU MENTIONED THE HUMAN RESOURCES FOR PEOPLESOFT. WAS

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1 THERE ANYTHING ELSE BESIDES HUMAN RESOURCES THAT WAS  
2 PARTICULARLY DESIRABLE?

3 **A.** SIEBEL WAS VERY WELL-KNOWN AND IS STILL VERY WELL-KNOWN  
4 FOR CUSTOMER RELATIONSHIP MANAGEMENT. SO THE WAY THAT  
5 ENTERPRISES DEAL WITH THEIR CUSTOMERS OR CONSTITUENTS.

6 **Q.** PUTTING ASIDE SIEBEL AND J.D. EDWARDS, WITHIN PEOPLESOFT,  
7 IS THERE ANYTHING OTHER THAN HUMAN RESOURCES THAT WAS  
8 PARTICULARLY DESIRABLE?

9 **A.** YES. ACTUALLY, PEOPLESOFT WAS VERY WELL-KNOWN AND STILL  
10 IS VERY WELL-KNOWN FOR FINANCIALS FOR GOVERNMENTS.

11 SO, YOU KNOW, GOVERNMENT HAS TO DO ACCOUNTING JUST  
12 LIKE A BUSINESS DOES. THE WAY THEY DO IT IS A LITTLE BIT  
13 DIFFERENT, SO IT REQUIRES SPECIALIZED FUNCTIONALITY --

14 **THE REPORTER:** I'M SORRY.

15 **BY MR. HOWARD:**

16 **Q.** YOU HAVE TO SLOW DOWN. THE COURT REPORTER HAS TO TAKE  
17 DOWN EVERYTHING YOU SAY.

18 **A.** GOT IT. SORRY.

19 SO, YES, GOVERNMENTS -- VERY SORRY. GOVERNMENTS DO  
20 ACCOUNTING A LITTLE DIFFERENTLY THAN BUSINESSES DO AND SO IT  
21 REQUIRES SPECIALIZED APPLICATIONS TO HELP MANAGE THAT  
22 ACCOUNTING. AND PEOPLESOFT IS WELL-KNOWN FOR THAT PARTICULAR  
23 FUNCTIONALITY.

24 **MR. HOWARD:** THANK YOU. YOU CAN TAKE THAT ONE DOWN.

25 ///

1 **BY MR. HOWARD:**

2 **Q.** MR. SCREVEN, HOW ARE THESE DIFFERENT RELEASES AND SUPPORT  
3 PRODUCTS DELIVERED TO CUSTOMERS?

4 **A.** WE DELIVER OUR PRODUCTS TO CUSTOMERS EITHER ON PHYSICAL  
5 MEDIA LIKE A CD OR DVD THAT YOU SAW, AND WE ALSO DELIVER IT ON  
6 LINE SO CUSTOMERS CAN DOWNLOAD IT.

7 IN EVERY CASE, WHAT YOU DOWNLOAD OR WHAT YOU GET ON  
8 A CD OR DVD IS USED TO CREATE SOMETHING CALLED AN ENVIRONMENT.

9 NOW AN ENVIRONMENT IS THE ACTUAL INSTALLATION OF THE  
10 PROGRAM, THE DATABASE OR THE APPLICATION THAT LETS YOU RUN THE  
11 DATABASE OR RUN THE APPLICATION. IT IS ALSO ESSENTIAL TO HAVE  
12 THOSE ENVIRONMENTS AROUND IF YOU'RE -- FOR A SUPPORT PROVIDER.

13 **Q.** ALL RIGHT. FINALLY, I WANT TO COME BACK TO THE ROLE THAT  
14 YOU WILL MENTIONED RELATED TO SYSTEM SECURITY AT ORACLE.

15 CAN YOU EXPLAIN WHAT THAT COVERS?

16 **A.** YES. SO, I AM ACTUALLY RESPONSIBLE FOR ALL OF ORACLE'S  
17 INTERNAL SECURITY. SO, OUR PHYSICAL SECURITY ORGANIZATION AND  
18 OUR PRODUCT INFORMATION ASSURANCE TEAM WHICH HELPS MAKE SURE  
19 OUR PRODUCTS ARE SECURE, AND OUR INFORMATION SECURITY TEAM ALL  
20 REPORT TO ME.

21 THE GROUP WHICH I THINK IS MOST RELEVANT FOR THIS  
22 TRIAL IS ACTUALLY THE INFORMATION SECURITY TEAM.

23 **Q.** AS THE PERSON IN CHARGE OF ORACLE'S SECURITY, WAS THERE A  
24 TIME AT WHICH WRONGFUL CONDUCT BY SAP OR TOMORROWNOW CAME TO  
25 YOUR ATTENTION?



1     **A.**     YES.     ABSOLUTELY.

2                     SO, I THINK IT WAS NOVEMBER OF 2006, SOMEONE WHO  
3     WORKED FOR ME WHO ACTUALLY REPORTED TO ME IN CHARGE OF THE  
4     INFORMATION SECURITY TEAM TOLD ME THAT WE HAD BEEN EXPERIENCING  
5     A VERY LARGE NUMBER OF DOWNLOADS, EXCESSIVELY LARGE NUMBER OF  
6     DOWNLOADS FROM AN IP ADDRESS. AN IP ADDRESS IS A COMPUTER  
7     INTERNET ADDRESS. THAT COMPUTER INTERNET ADDRESS BELONGED TO A  
8     SUBSIDIARY OF SAP.

9     **Q.**     WHAT DID YOU DO NEXT?

10    **A.**     I DID TWO THINGS. FIRST I NOTIFIED OUR CEO LARRY ELLISON.  
11    I ALSO INSTRUCTED THE INFORMATION SECURITY TEAM TO BEGIN  
12    INVESTIGATING.

13    **Q.**     EXPLAIN WHAT YOU DID AND WHAT YOU CONCLUDED AS A RESULT OF  
14    THAT INVESTIGATION?

15    **A.**     WELL, WE ANALYZED ALL THE PIECES OF EVIDENCE THAT WE COULD  
16    FIND, THE LOG FILES, ET CETERA THAT OUR SUPPORT SYSTEMS CREATE  
17    AND WHAT WE FOUND WAS THAT, YOU KNOW, SAP SUBSIDIARY HAD  
18    DOWNLOADED JUST MASSIVE AMOUNTS OF SUPPORT MATERIALS IN A WAY  
19    WHICH CLEARLY THEY WERE USING -- THEY WERE USING THINGS LIKE  
20    FAKE NAMES AND FAKE PHONE NUMBERS, THEY WERE USING LOGIN  
21    CREDENTIALS OF CUSTOMERS WHO HAD LEFT OR WERE ABOUT TO LEAVE  
22    ORACLE SUPPORT. THEY WERE, I MEAN, JUST DOWNLOADING SO MUCH  
23    DATA PER CREDENTIAL THAT THERE'S NO WAY IT COULD POSSIBLY  
24    CORRESPOND TO A HUMAN BEING ACTUALLY DOING THE DOWNLOADING. IT  
25    HAD TO BE SOME SORT OF AUTOMATIC SCRAPING TOOL.

1 Q. WHAT DID THE USE OF AN AUTOMATED TOOL SUGGEST TO YOU?

2 A. WELL, IT SUGGESTED TO ME SINCE, YOU KNOW, WE DIDN'T  
3 PRODUCE ONE OURSELVES, IT SUGGESTED TO ME THAT THEY HAD REVERSE  
4 ENGINEERED THE LEGITIMATE WAY THAT WE PROVIDE IT TO OUR  
5 CUSTOMER TO ACTUALLY GET ACCESS TO THE SUPPORT MATERIALS.

6 Q. OTHER THAN CLICKING FASTER THAN A HUMAN COULD, WAS THERE  
7 ANYTHING ELSE DISTINCTIVE ABOUT THE DOWNLOADING YOU WERE  
8 INVESTIGATING?

9 A. YES. AS I MENTIONED FOR A GIVEN CREDENTIAL THAT THEY USED  
10 TO LOG INTO OUR SUPPORT SITE, THEY WERE DOWNLOADING DOCUMENTS  
11 THAT THE CUSTOMER WHO ACTUALLY WAS ISSUED THAT CREDENTIAL DID  
12 NOT HAVE THE RIGHT TO GET. THEY WERE DOWNLOADING DOCUMENTS  
13 INDISCRIMINATELY. TRYING TO GRAB EVERY SINGLE THING THEY  
14 COULD.

15 THEY WERE -- THEY WERE, IN FACT, BECAUSE THEY HAD  
16 BUILT THE SCRAPING TOOL, THEY ACTUALLY WERE GETTING DOCUMENTS  
17 THAT NO CUSTOMER HAD A RIGHT TO GET. THEY WERE DOWNLOADING  
18 DOCUMENTS THAT WERE INTERNAL FOR ORACLE ONLY. RIGHT? AND IT  
19 WAS JUST AN OVERWHELMING LOAD ON OUR SUPPORT SYSTEMS.

20 MR. HOWARD: THANK YOU, YOUR HONOR. I HAVE NOTHING  
21 FURTHER.

22 THE COURT: ALL RIGHT.  
23 COUNSEL? MR. COWAN?

24 MR. COWAN: NO QUESTIONS, YOUR HONOR.

25 THE COURT: ALL RIGHT. THANK YOU.

1 MR. SCREVEN, YOU ARE EXCUSED. YOU MAY STEP DOWN.

2 THE WITNESS: THANK YOU.

3 THE COURT: MR. HOWARD, NEXT WITNESS?

4 MR. HOWARD: YES. YOUR HONOR, ARE THE EXHIBITS NOW  
5 ADMITTED INTO EVIDENCE HAVING IDENTIFIED THEM AS STIPULATED?

6 THE COURT: THE STIPULATED ONES ARE AUTOMATICALLY  
7 ADMITTED.

8 MR. HOWARD: THANK YOU, YOUR HONOR.

9 THE COURT: I DON'T KNOW THAT WE HAVE A NUMBER,  
10 THOUGH, FOR THIS ONE. WHAT'S THIS ONE? ARE WE JUST GOING TO  
11 REFER TO IT BY THE NUMBER THAT'S ON THE FRONT?

12 MR. HOWARD: YES, IF THAT'S ACCEPTABLE TO YOUR  
13 HONOR, EXHIBIT 4813?

14 THE CLERK: WE HAVE THAT ONE. THERE WAS THIS OTHER  
15 ONE THAT WE CALLED A JOINT EXHIBIT 2?

16 THE COURT: I THINK THAT WAS JUST A DEMONSTRATIVE.  
17 I THINK ALL THE OTHERS WERE JUST DEMONSTRATIVE.

18 MR. HOWARD: THE CD IS IN EVIDENCE, 2115-1.

19 THE CLERK: I HAVE THAT ONE.

20 MR. HOWARD: THOSE ARE THE ONLY TWO FOR MR. SCREVEN.

21 THE COURT: RIGHT. NUMBER FOUR WAS THE ATTACHMENT  
22 TO THE STIPULATION, AND THAT DIDN'T HAVE A SEPARATE NUMBER.

23 MR. HOWARD: NO. THAT IS IN THE RECORD AS THE  
24 STIPULATION.

25 THE COURT: ALL RIGHT.

1           **MR. HOWARD:** YOUR HONOR, OUR NEXT WITNESS IS BY  
2 VIDEOTAPE, JOHN RITCHIE. HIS TAPE RUNS ABOUT 49 MINUTES. WE  
3 WOULD PROPOSE TO START HIM IN THE REMAINING TIME AND FINISH HIM  
4 ON THURSDAY AT THE COURT'S PREFERENCE.

5           **THE COURT:** SURE. FINE WITH ME.

6           **MR. HOWARD:** IN THAT CASE, YOUR HONOR, WE CALL BY  
7 VIDEO DEPOSITION JOHN RITCHIE.

8           DOES COUNSEL WANT TO BE HEARD?

9           **MR. LANIER:** THERE'S AN ISSUE OF THE ADMISSION OF  
10 EXHIBITS AS WELL. OUR UNDERSTANDING IS THAT TWO OF THE  
11 EXHIBITS HAVE BEEN STIPULATED AS ADMITTED, AND THAT THE ONE  
12 EXHIBIT, 1815, A PORTION WILL BE SHOWN JUST FOR DEMONSTRATIVE  
13 PURPOSES.

14           **THE COURT:** IS THAT YOUR UNDERSTANDING AS WELL,  
15 COUNSEL?

16           **MR. LANIER:** JUST TO CLEAN THAT UP BEFORE WE PLAY  
17 HIM.

18           1815, THEY WILL SHOW A PORTION OF THAT DURING THE  
19 TESTIMONY FOR DEMONSTRATIVE PURPOSES ONLY.

20           **THE COURT:** ALL RIGHT. DOES THAT SOUND RIGHT TO  
21 YOU, MR. HOWARD?

22           **MR. HOWARD:** I AM TOLD THAT IT SOUNDS RIGHT TO ME,  
23 YOUR HONOR.

24           (LAUGHTER).

25           **THE COURT:** ALL RIGHT.

1                   **MR. HOWARD:**   SO MR. RITCHIE --

2                   **THE COURT:**   YOU ARE GOING TO PROJECT IT ON THIS  
3                   SCREEN?

4                   **MR. HOWARD:**   WE'RE GOING TO PROJECT IT ON THE  
5                   SCREEN.   HE'S THE SENIOR AUTOMATION DEVELOPER FOR TOMORROWNOW.  
6                   CLIPS WERE SHOWN IN THE OPENING.   THIS IS HIS FULL TESTIMONY.

7                   **THE COURT:**   ALL RIGHT.   DOES HE INTRODUCE HIMSELF  
8                   ALSO AT THE BEGINNING OF THE DEPOSITION?   ARE THERE  
9                   INTRODUCTORY QUESTIONS OR ARE THEY JUST EXCERPTS?

10                  **MR. HOWARD:**   THERE WILL BE SOME FOUNDATIONAL  
11                  BACKGROUND AT THE BEGINNING.

12                  **THE COURT:**   ALL RIGHT.   THEN YOU JUST NEED TO SHOW  
13                  IT.

14                  GENERALLY WHEN A VIDEOTAPED DEPOSITION IS PLAYED IN  
15                  LIEU OF AN APPEARANCE, THE COURT REPORTER DOES NOT RECORD THE  
16                  TESTIMONY.   THE ACTUAL VIDEOTAPE OR CD NOW CAN ACTUALLY COME IN  
17                  AS PART OF THE TRIAL RECORD.

18                  EVERYONE IN AGREEMENT WITH THAT?

19                  **MR. LANIER:**   YES, YOUR HONOR.

20                  **MR. HOWARD:**   YES, YOUR HONOR.

21                  **THE COURT:**   ALL RIGHT.

22                  (JOHN RITCHIE VIDEOTAPED DEPOSITION PLAYED.)

23                  **MR. HOWARD:**   YOUR HONOR, IT IS 1:30.

24                  **THE COURT:**   OKAY.

25                  **MR. HOWARD:**   I SHOULD CLARIFY THAT THE TESTIMONY

1 THAT IS BEING PLAYED THROUGH THE VIDEO CLIPS IS THE TESTIMONY  
2 THAT BOTH SIDES HAVE DESIGNATED FROM WHATEVER DEPOSITION IS  
3 BEING PLAYED.

4 **THE COURT:** OKAY. WE CAN FIGURE OUT HOW TO  
5 DESIGNATE THE TIME.

6 **MR. HOWARD:** THANK YOU, YOUR HONOR.

7 **THE COURT:** ALL RIGHT. LADIES AND GENTLEMEN, WE ARE  
8 AT THE END OF OUR FIRST TRIAL DAY. YOU ARE GOING TO BE  
9 EXCUSED. KEEP IN MIND THAT TOMORROW I CONDUCT OTHER BUSINESS  
10 AND YOU ARE NOT DUE BACK HERE UNTIL THURSDAY MORNING AT 8:30.

11 ALSO KEEP IN MIND THE INSTRUCTIONS THAT I HAVE  
12 ALREADY GIVEN YOU ON SEVERAL OCCASIONS THAT AS LONG AS THIS  
13 MATTER IS PENDING, YOU MAY NOT TALK ABOUT IT AMONG YOURSELVES  
14 OR WITH ANYONE ELSE, YOU MAY NOT DO ANY INDEPENDENT RESEARCH,  
15 ELECTRONICALLY OR OTHERWISE, AND YOU MAY NOT OTHERWISE  
16 COMMUNICATE ABOUT THE TRIAL. AND YOU ARE TO AVOID ANY NEWS  
17 REPORTS, WHETHER IN THE PRINT MEDIA OR OTHERWISE.

18 AND WE WILL SEE YOU HERE ON THURSDAY MORNING AT  
19 8:30. THANK YOU.

20 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY).

21 **THE COURT:** OKAY. IS IT GOING TO BE OBVIOUS FROM  
22 THE DEPOSITION WHEN THE CROSS-EXAMINATION PORTION OF IT BEGINS?

23 **MR. HOWARD:** NO.

24 **THE COURT:** ALL RIGHT. DO YOU WANT TO SPLIT IT DOWN  
25 THE MIDDLE OR IS THERE SOME OTHER --

1           **MR. PICKETT:** WE HAVE DONE THAT.

2           **THE COURT:** OKAY.

3           **MR. LANIER:** WE HAVE AN AGREEMENT WITH THEM AS TO  
4 HOW THE TIME IS ALLOCATED.

5           **THE COURT:** ARE YOU GOING TO TELL US?

6           **MR. PICKETT:** SURE.

7           **THE COURT:** ALL RIGHT.

8           **MR. PICKETT:** IF ONE SIDE DESIGNATES, IT COUNTS  
9 AGAINST THAT PARTY. IF THE OTHER SIDE COUNTERDESIGNATES, IT  
10 COUNTS AGAINST THAT PARTY. WE HAVE CALCULATED THOSE NUMBERS  
11 AND WE HAVE THEM AND WILL PROVIDE THEM TO YOU.

12           **MR. LANIER:** IT IS OBVIOUS WHEN CROSS-EXAMINATION  
13 BEGINS BECAUSE THE VOICE CHANGES AND THE QUESTIONS CHANGE.

14           **THE COURT:** I THOUGHT THAT MIGHT BE OBVIOUS.

15           **MR. PICKETT:** WE DO IT BY DESIGNATION, BUT NOT BY  
16 THE QUESTIONER.

17           **THE COURT:** OKAY. ARE THERE ANY ISSUES?

18           **MR. PICKETT:** I HAVE ONE ISSUE.

19           **THE COURT:** OKAY.

20           **MR. PICKETT:** AS YOU KNOW FROM YESTERDAY, I AM A FAN  
21 OF A MODERN PRETTY BROAD OPENING STATEMENT, BUT I THINK THERE  
22 STILL REMAINS ONE CARDINAL SIN, AND THAT IS TO MISSTATE LAW.

23           AT PAGE 103, LINE 22 OF MR. MITTELSTAEDT'S  
24 STATEMENT, HE SAID THAT THE ACTUAL PARTIES NEED TO ENTER INTO A  
25 LICENSE. AND HE WENT ON TO SAY THAT WHETHER AN ACTUAL LICENSE

1 BETWEEN SAP AND ORACLE WOULD HAVE BEEN REACHED WAS SPECULATIVE.

2 NOW, YOUR HONOR KNOWS --

3 **THE COURT:** DID HE USE THE WORD "SPECULATIVE"?

4 **MR. LANIER:** YES.

5 **MR. PICKETT:** HE DID USE THE WORD SPECULATIVE AT  
6 PAGE 103, LINE 22.

7 **THE COURT:** I DON'T HAVE THE TRANSCRIPT.

8 **MR. PICKETT:** I UNDERSTAND.

9 **THE COURT:** I'LL TAKE YOUR WORD FOR IT.

10 **MR. PICKETT:** AS YOUR HONOR KNOWS FROM DIGGING  
11 THROUGH REPEATED TIMES, THIS WAS ONE OF THE SUBJECTS OF THEIR  
12 SUMMARY JUDGMENT THAT WE HAVE TO PROVE THERE WOULD BE AN ACTUAL  
13 LICENSE. BUT NO.

14 **THE COURT:** I NOTICED IT WHEN HE DID IT.

15 **MR. PICKETT:** SO I WOULD ASK YOUR HONOR FOR A  
16 CURATIVE INSTRUCTION TO THE JURY AS TO WHAT THE ACTUAL LAW IS  
17 CONCERNING THE WILLING SELLER AND WILLING BUYER, NOT THAT WE  
18 HAVE TO HAVE EVIDENCE THAT THERE WOULD ACTUALLY BE A MEETING OF  
19 THE MINDS.

20 **THE COURT:** I ASSUME YOU ALL ARE WORKING ON THE  
21 INSTRUCTIONS AND THE INSTRUCTIONS WILL SAY IT IS AN OBJECTIVE  
22 AND NOT A SUBJECTIVE STANDARD. ARE YOU NOT WORKING ON THOSE?

23 **MR. PICKETT:** WE ARE WORKING ON THOSE. WE HAVE  
24 PROPOSED THAT STANDARD; THEY ARE OPPOSING IT. THAT'S WRONG.  
25 BUT MORE TO THE POINT, IF WE DON'T INSTRUCT THE JURY UNTIL FOUR



1 WEEKS, FIVE WEEKS FROM NOW, THEY WILL BE THINKING ALL DURING  
2 THE TRIAL, WELL, MR. MITTELSTAEDT SAID THERE HAD TO BE EVIDENCE  
3 OF AN ACTUAL AGREEMENT, OF A, YOU KNOW, SUBJECTIVE STANDARD.

4 **THE COURT:** I AM NOT SO SURE THAT IT NEEDS A  
5 CURATIVE INSTRUCTION AT THIS POINT. FIRST OF ALL, I TOLD THE  
6 JURY THAT I AM GOING TO INSTRUCT THEM ON THE LAW THAT APPLIES,  
7 AND WHAT THE ATTORNEYS SAY IS NOT EVIDENCE, IT IS MERELY  
8 ARGUMENT.

9 I NOTICED IT. I LOOKED AT COUNSEL, I KNOW THAT HE  
10 NOTICED IT WHEN MR. MITTELSTAEDT SAID THAT. I FORGOT THAT HE  
11 USED THE WORD "SPECULATIVE", BUT I KNOW THAT HE WAS DANCING  
12 AROUND THAT SUBJECT. AND IT WAS MORE THAN JUST THE  
13 GEORGIA-PACIFIC FACTORS AND THE VARIOUS DIFFERENT  
14 CONSIDERATIONS, BUT I DON'T THINK -- I THINK A CURATIVE  
15 INSTRUCTION IS NOT NECESSARY AND I THINK IT WOULD CALL UNDUE  
16 ATTENTION TO THAT PARTICULAR POINT.

17 **MR. PICKETT:** THANK YOU, YOUR HONOR.

18 **THE COURT:** WE WILL INSTRUCT THEM PROPERLY AT THE  
19 END OF THE CASE.

20 IS THERE ANYTHING ELSE?

21 **MR. LANIER:** NOT FROM OUR SIDE.

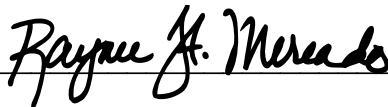
22 **THE COURT:** SEE YOU ON THURSDAY.

23 (PROCEEDINGS CONCLUDED AT 1:34 P.M.)  
24  
25

**CERTIFICATE OF REPORTER**

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTERS' CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 3, 2010